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Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ANTHONY THOMAS TORCASIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court's decision rendered last term in *Evans v. United States,* ___ U.S. ___ , 112 S.Ct. 1881 (1992), requiring a *quid pro quo,* that is, a payment in return for a public official's agreement to perform certain acts, in all cases of official right extortion (18 U.S.C. §1951), should be applied in the Fourth Circuit.

2. Whether the government may raise non-satisfaction of the requirements for introducing the former testimony of "unavailable" declarants, set out in Fed.R.Evid. 804(b)(1), as a reason for excluding the exculpatory grand jury testimony of witnesses whose availability is within the government's control.

3. Whether the Fifth Amendment to the Constitution requires that a target of a grand jury investigation, who was not informed that he was a target and who was subjected to prosecutorial abuse in the grand jury, be advised on the record of his rights against self-incrimination.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Anthony Thomas Torcasio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The judgment of the United States Court of Appeals for the Fourth Circuit is reported at 959 F.2d 503 (1992). App. A, *infra,* 1a-9a.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1992. The petition and suggestion for rehearing in banc was denied on August 6, 1992. App. B, *infra*, 10a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

AUTHORITIES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *** nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ***

The Sixth Amendment to the United States Contitution states:

> In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; ***

Rule 804(b)(1) of the Federal Rules of Evidence states in relevant part:

> (b) **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) **Former testimony.** Testimony given as a witness at another hearing of the same or a different proceeding *** if the party against whom the testimony is now offered *** had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

STATEMENT

Petitioner was indicted on February 7, 1991, in a superseding two-count indictment and charged under 18 U.S.C. §§2 and 1951 with aiding and abetting West Virginia Senator Daniel Tonkovich[1] and of causing extortion under color of official right and with perjury before a grand jury in violation of 18 U.S.C. §1623. He was convicted of both counts following a four-day jury trial in the United States District Court for the Southern District of West Virginia. The district court sentenced petitioner to thirty-six months in prison on the aiding and abetting extortion count, to a twenty-four month concurrent sentence for the perjury violation, and fined him $5,000. The Court of Appeals for the Fourth Circuit affirmed both convictions, but remanded the case for resentencing in light of its decision in *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), holding that an upward adjustment for testimonial denial of guilt under Guideline §3C1.1 of the United States Sentencing Guidelines was unconstitutional. The Court of Appeals then granted the government's motion for stay of the mandate pending this Court's decision in *United States v. Dunnigan*, No. 91-1300.

INTRODUCTION

In 1985, the then-Governor of West Virginia announced that he intended to place the issue of casino gambling on

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[1] Daniel Tonkovich had been president of the West Virginia Senate since 1984. He was indicted in July 1989 on five counts of extortion under color of official right, 18 U.S.C. §1951. In September 1989, one week into his trial, Tonkovich entered a plea of guilty to one count in connection with the receipt of a $5,000 check from WVCC, Inc., the investors' corporation, and testified at petitioner's trial with immunity as part of the plea agreement.

the ballot for a public referendum to determine if West Virginians wanted legalized gambling. During its winter session of 1986, the West Virginia Legislature was scheduled to consider whether the state should legalize gambling. In late 1985, petitioner, who had worked in the legalized gambling business for years, was asked to advise a small group of investors, including two brothers from Atlantic City, Fred and Ralph Perone, who hoped to operate a casino at the Grande Hotel in Weirton, West Virginia. Senator Tonkovich met with these investors, including the Perones, but not petitioner, in November 1985 to discuss the economic benefits to West Virginia of bringing legalized gambling to the State. App. A, *infra,* 2a. In December 1985, a second meeting of the investors took place, and Tonkovich and petitioner both were present, meeting for the first time. App. A, *infra,* 3a. The group, led by Fred Perone, asked Tonkovich whether gambling could be legalized more easily by statute or by constitutional amendment. Tonkovich responded that he believed that legalized gambling could be accomplished only by constitutional amendment. Tr. 116-118. Fred Perone inquired whether Tonkovich, who owned a small public relations firm, would be interested in conducting a public relations campaign to increase interest in legalized casino gambling among the voters of West Virginia. Tonkovich declined but agreed to arrange a meeting with another public relations firm. According to Tonkovich, after this December 1985 meeting, petitioner offered him a sum of cash as a campaign contribution, which Tonkovich also declined. Petitioner testified that the campaign contribution offer never occurred. App. A, *infra,* 3a.

One month later, the second public relations firm presented to the investors, petitioner and Tonkovich their proposal, which included a $15,000 subcontract to Tonkovich if a survey needed to be conducted before the public relations campaign commenced. Tonkovich testified that after the presentation, petitioner asked him to speak privately. According to Tonkovich, petitioner complained that the public relations firm's proposal was too expensive and asked Tonkovich to be the hotel's in-state consultant. Tonkovich testified that the cost of the market research would be between $12,000 and $15,000. Tonkovich further testified that he and petitioner agreed on a $15,000 contract, subject to the approval of the investors. At trial, Tonkovich stated that he had wanted a written contract and had suggested that it be in the name of his administrative assistant, Robert Cain. Petitioner denied that this conversation had taken place, and two other witnesses corroborated that petitioner had left immediately after the business meeting. App. A, *infra,* 3a.

Tonkovich testified that he drafted a handwritten contract and informed Cain that the contract would be in Cain's name. App. A, *infra,* 3a. The investors' lawyer, Robert D'Anniballe, obtained Tonkovich's handwritten contract from the general manager of the Grande Hotel who had received it from Fred Perone and another investor. Tr. 340-41, 456-58. D'Anniballe contacted Fred Perone, and they discussed changes to the contract. Tr. 341-42. D'Anniballe sent Cain the revised contract, which called for three $5,000 payments in exchange for public relations work. D'Anniballe sent all three $5,000 payments to Cain in February 1986. Tr. 251-52, 342. Cain deposited the $15,000 to his account and during March and April 1986 gave Tonkovich $11,400, the

$15,000 minus $3,600 which Cain would have to pay in income tax since the checks had been payable to Cain. App. A, *infra,* 3a-4a.

According to Tonkovich, petitioner gave him $1,000 in cash as a gift for his newborn son in mid-February 1986 and another $1,000 in cash in May 1986 as a Mother's Day gift for his wife.[2] Petitioner testified that he never gave Tonkovich these cash gifts. In May and June 1986, *The Charleston Gazette* published a series of articles about Tonkovich's outside business activities and suggested they might constitute extortion. Tonkovich decided to return the $1,000 Mother's Day gift by sending a check to petitioner at the Grande Hotel. The check was never cashed and was returned to him. App. A, *infra,* 4a. Tonkovich also obtained a $15,000 cashier's check payable to Cain, who deposited the check in his account, obtained another $15,000 cashier's check payable to D'Anniballe, and sent it to D'Anniballe in June 1986.[3] Tr. 167-68, 275. When D'Anniballe received the check, he contacted Fred Perone, who directed him to deposit it in the investors' account which D'Anniballe had maintained. Tr. 354-55.

In October 1988, Cain was contacted by a special agent of the Internal Revenue Service, who met with Cain concerning his tax liability. According to Cain, at that meeting, the events of which Cain immediately related to Tonkovich, the agent asked Cain about his $15,000 contract and Cain falsely replied that he had met with

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[2]Tonkovich never told the government about either of these gifts until January 1991, some fourteen months after he began cooperating with the government. Tr. 218-19.

[3]Tonkovich was not asked nor did he say why he did not return the alleged $1,000 gift to his son.

petitioner in Charleston prior to signing the contract. Cain admitted at trial that he had made up the story about meeting petitioner in Charleston because petitioner's name was the only one he could recall as being associated with the contract. Tr. 282-85.

On January 5, 1989, pursuant to subpoena, petitioner appeared without counsel and testified before a federal grand jury in Bluefield, West Virginia. He was not advised that he was a target[4] of the grand jury even though Cain previously had told the government and testified before the grand jury that petitioner had furnished monies to him which were destined for Tonkovich. Transcript of March 11, 1991 pretrial hearing at page 46. Nor was petitioner advised of his constitutional rights as a witness before the grand jury. App. C, *infra*, 11a-13a. In response to the prosecutor's questions, petitioner denied that he had ever offered or paid any money to Tonkovich for Tonkovich's assistance in obtaining the enactment of gambling laws in the State of West Virinia, or for any other reason. App. C, *infra*, 13a-15a, 18a.

THE QUID PRO QUO ISSUE

The first count of the indictment charged that petitioner had aided and abetted Tonkovich's extortion under color of official right by allegedly (1) offering Tonkovich a cash campaign contribution in December

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[4]Section 9-11.150 of the United States Attorneys' Manual defines the terms "target" and "subject" of a grand jury investigation. A "target" is a person as to whom the prosecutor or grand jury has substantial evidence linking him/her to the commission of a crime, and who, in the judgment of the prosecutor, is a putative defendant. A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation.

1985; (2) offering to pay Tonkovich $15,000 under a consulting contract; (3) giving $1,000 to Tonkovich on the occasion of his son's birth; and (4) providing $1,000 to Tonkovich's to purchase a Mother's Day gift for his wife.

Petitioner denied that he had paid or offered to pay any money to Tonkovich. Even assuming *arguendo* that petitioner had made these payments – and we strongly assert that he did not – the district court instructed the jury that it need not find a *quid pro quo*, that is, a payment in return for Tonkovich's agreement to perform specific official acts. The district court instructed the jury:

> It is not necessary that the government prove that any public official, including Senator Tonkovich, committed or promised to commit a *quid pro quo*, that is, an official action in return for the payment of money. Such a *quid pro quo* may, of course, be forthcoming in this sort of case or it may not. In any event, it is not an essential element of the crime that the United States needs to prove.

Tr. 874-75. Nor did the government allege or even prove a *quid pro quo*. At trial, Tonkovich testified that he "thought one of the reasons that *they* paid him the $15,000 was that he was the Senate president." Tr. 151. He further testified that he "believe[d] *they* were hoping to have access and influence on me." Tr. 154. (Emphasis added.) According to Tonkovich, he was not asked by petitioner or anyone else to do anything improper under the $15,000 contract. Tr. 201, 240. Moreover, Tonkovich freely admitted that neither petitioner nor WVCC, Inc., the investors' corporation, ever asked him to change his position of opposition to casino gambling legislation. Tr. 240.

The court of appeals agreed with the district court that no *quid pro quo* was necessary. App. A, *infra*, 5a. Between the time of the court of appeals' decision on March 11, 1992 and its denial of the petition for rehearing and suggestion for rehearing in banc on August 6, 1992, this Court on May 26, 1992 decided *Evans v. United States*, ___ U.S. ___ , 112 S.Ct. 1881 (1992). *Evans* requires a *quid pro quo* in all cases of extortion under color of official right. On May 28, 1992, petitioner alerted the court of appeals about the *Evans* decision and provided a copy of this Court's opinion in that case, along with a letter arguing that petitioner's conviction should be reversed on the basis of *Evans*. App. D, *infra*, 19a-22a. The court of appeals asked the government to respond, which it did by letter of June 19, 1992, arguing that *Evans* did not apply. Thereafter, without any explanation of why it believed that *Evans* did not apply, the Fourth Circuit Court of Appeals denied petitioner's petition for rehearing and suggestion for rehearing in banc. App. B, *infra*, 10a.

THE RULE 804(b)(1) ISSUE

Petitioner's theory of defense essentially was a denial that he had paid or offered to pay any money to Tonkovich, including the $15,000 under the consulting contract which Tonkovich received from Fred Perone's lawyer, D'Anniballe. In support of this defense, petitioner sought to introduce at trial two key pieces of evidence: (1) the grand jury testimony of Fred Perone and Ralph Perone of February 14, 1989 and May 20, 1989 and (2) an Interview Report of Fred Perone prepared by Agent

Irwin Schechter of the New Jersey Division of Gaming Enforcement[5] on June 28, 1989.[6]

At trial, petitioner argued to have both Fred and Ralph Perone's grand jury transcripts admitted as "former testimony" under Fed.R.Evid. 804(b)(1). Ralph Perone testified at the grand jury that the corporate shareholders of WVCC, Inc. made the decision to hire a public relations firm which employed Tonkovich and authorized D'Anniballe to make the $15,000 payment to the public relations firm. App. E, *infra*, 24a-31a. Ralph Perone identified those present at the meeting where the decision to hire Tonkovich's firm was made as "Mr. Siracusa, Dr. Slotoroff, Messrs. Levine, myself, my brother [Fred], Mr. Kepner and Mr. Mauler." In response to the prosecutor's question in the grand jury, Ralph Perone stated that he did not know if petitioner had been present at that meeting. App. E, *infra*, 26a.

Although Fred Perone was less precise and forthcoming than his brother in his grand jury appearance, a fair reading of his testimony shows that he stated that the corporation had authorized the payment of $15,000 to a public relations firm where Tonkovich either was employed or in which he had an interest. App. G, *infra*, 35a-39a.

The Perones had been subpoenaed for trial and, through their attorney, asserted their rights under the

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[5]This official agency of the State of New Jersey supervises the casino industry in Atlantic City.

[6]The court of appeals conceded that the Interview Report stated that Fred Perone had "told the investigators that he had paid $15,000 to Tonkovich – one of the payments at issue in Torcasio's trial – to do public relations work for the investors' potential casino." App. A, *infra*, 6a.

Fifth Amendment and refused to testify. The government conceded that the Perones were "unavailable" within the meaning of Rule 804(b)(1). Transcript of March 11, 1991 pretrial hearing at page 24.

At the pretrial hearing, the lead prosecutor was the first to suggest Rule 804(b)(1) as a vehicle for introducing the grand jury testimony, but then argued against its admission on the ground that he had not been given an opportunity to examine Fred Perone in the grand jury about the Interview Report, which petitioner was also trying to introduce. Transcript of March 11, 1991 pretrial hearing at pages 30-31.

The district court found that the pretrial hearing "indicated no basis for the admissibility of the grand jury testimony" and expressed the view that unless the court found "some reason during the course of the trial to permit admission in some fashion for some purpose," no reference to the Perones' grand jury testimony should be made "without first clearing it with the court." Transcript of March 11, 1991 pretrial hearing at page 32-33. The court of appeals affirmed the district court's decision, with no explanation, simply stating that

> Although the court left open the possibility of admitting the testimony during trial, the defense did not raise the issue again. After reviewing the circumstances surrounding both of these exclusions [Fred and Ralph Perone's grand jury transcripts], we are not persuaded that the district court abused its discretion in either instance.

App. A, *infra*, 7a.

PETITIONER'S GRAND JURY APPEARANCE

The second count of the indictment charged petitioner with false declaration before a grand jury relating to his denial that he had ever offered or paid any money to Tonkovich for Tonkovich's assistance in obtaining enactment of gambling laws in the State of West Virginia or for any other reason.

Petitioner's motion *in limine* to suppress his grand jury testimony was premised on the fact that at the time of his appearance, the government knew that petitioner was a target of its grand jury investigation, yet chose not to inform petitioner of his target status nor advise him of his rights as a witness on the record. Moreover, the prosecutors' behavior was deliberately inflammatory and unfair and represented a pattern of prosecutorial abuse of the grand jury process.

By the time petitioner testified before the grand jury, the case agent, Special Agent Charles Little of the Internal Revenue Service, had been told by Cain, Tonkovich's administrative assistant, that Cain had received money on behalf of Tonkovich through an agreement with petitioner. Transcript of March 11, 1991 pretrial hearing at page 46. In fact, prior to petitioner's grand jury appearance, Cain had entered into a plea agreement and agreed to plead guilty to a tax charge arising from the receipt of the $15,000, and testified in the grand jury in December 1988. *Id.* at 38-39, 48. In addition to Cain's sworn testimony, Agent Little had interviewed D'Anniballe and had received from him a copy of the agreement between Tonkovich and WVCC and other records. *Id.* at 50-53. In a legal conclusion more appropriately made by a prosecutor, not the case agent, and using a term of art of the United States Attorneys' Manual, Little testified at the pretrial hearing that petitioner's status at the

time of his grand jury appearance was a "subject of the investigation." *Id.* at 42. However, in a remarkable turn-around, at petitioner's sentencing hearing in a successful effort to enhance petitioner's sentence under U.S.S.G. §2J1.3(b)(2), Agent Little stated that "Mr. [Fred] Perone and Mr. Torcasio was [sic] the focus [of the investigation] from Mr. Cain's testimony forward."[7] Transcript of May 15-16, 1991 sentencing proceeding at pages 51-52.

Moreover, government counsel's behavior in the grand jury, which by any standard was highly abusive, belied Little's pretrial hearing testimony that petitioner had been merely a subject and confirmed his statement at sentencing that petitioner was indeed the "focus" of the investigation after Cain's testimony. For example, after petitioner agreed that if the State of West Virginia had consented to casino gambling, he would have liked to establish and run a gaming school, the following exchange took place in the grand jury:

Q. You are going to teach the sons and daughters of West Virginians how to run a gambling operation?

A. Pardon?

Q. That's what you wanted to do? You wanted to teach the sons and daughters of West Virginia how to run a gambling operation?

A. To instruct them how to have a school, a gaming school.

Q. You thought that would be a good thing for the State of West Virginia?

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[7] "Focus" is generally defined as "a point of concentration" or "center of attention." *Webster's Dictionary, Unabridged,* (2d ed. 1977). It is not a stretch to equate "focus" with "target."

A. Well, if there's unemployment, it's jobs.

Q. Uh-huh. Dealing dope is a job, too, isn't it?

A. No. I don't believe in dealing dope. I have two (2) kids, sir, and I believe that anybody that deals dope, they should take them out and don't even have a trial for them.

Q. Do you think organized crime is involved in casino gambling?

A. Well, I was never involved in organized crime.

Q. That was not my question.

A. They could be.

Q. Could be. Isn't organized casino gambling the lifeblood of organized crime? Isn't that how they launder their money?

A. Well, a lot of corporations are in it now, like I opened the MGM in Las Vegas.

Q. My question is: Isn't casino gambling the way organized crime launders their money? You know that, don't you?

A. They say they do.

Q. Yes, okay. And that's just what we need in the State of West Virginia, isn't it?

A. I don't think you will ever see gambling in the State of West Virginia.

Q. Because the citizens are too smart to bring it in here, aren't they?

A. Well, if they don't want it, that's their priority, so –

Q. *That's why it was important for you all to pay Dan Tonkovich, because you needed his support as the Senate president to get that legislation passed? Isn't that a fact?*

A. I never paid Don Tonkovich a penny and never offered him a penny.

Q. *Isn't that why it was important for people on behalf of WVCC to pay Dan Tonkovich, because WVCC and other gambling interests – or those interested in establishing casino gambling in West Virginia needed Dan Tonkovich's support to get that bill passed?*

A. Sir, like I said, that check was sent down there, I knew nothing about.

App. C, *infra*, 16a-18a (emphasis added). Wholly apart from his abusive, inflammatory and misleading questions,[8] the prosecutor clearly conveyed his belief that petitioner – and perhaps others – had paid Tonkovich to get gambling legislation passed in West Virginia. In

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[8]The two Assistant United States Attorneys conducting the grand jury proceedings regularly engaged in this type of "questioning" as the following excerpt demonstrates:

> Q. Isn't it true that if that is true, that if a five thousand dollar ($5,000) check was paid to Robert Cain during the time period that you all were trying to get casino gambling passed in the State of West Virginia, that would be a bribe, wouldn't it?
>
> A. Like I said, Ms. Hill, I am not an attorney.
>
> Q. It doesn't take an attorney to figure that out, does it?
>
> A. Like I told you, I told them that I would never have done it.

App. C. *infra*, 15a.

* * *

> Q. These are New Jersey judges [Fred and Ralph Perone] telling you that?
>
> A. Yes, sir.
>
> Q. What kind of a justice system have you got up in New Jersey?

App. C. *infra*, 16a.

other words, the government lawyer well knew that petitioner was a target of the grand jury's investigation and decided, for his own purposes, not to advise him of his target status *or* of his rights under the Fifth Amendment not to incriminate himself and under the Sixth Amendment to consult with counsel.

After a pretrial hearing, the district court found that appellant had received, attached to his subpoena, a document entitled "Advice to Grand Jury Witnesses"[9] and that petitioner was, at the time of his grand jury testimony a subject, rather than a target, of the grand jury investigation. Transcript of March 11, 1991 pretrial hearing at pages 67-69. The lower court also stated that it was "disturbed and troubled" that the United States Attorney's Office had failed to give petitioner "the warnings prescribed by the United States Attorneys' Manual" on the record before the grand jury. The court further noted that "were the United States Attorney's Office to fail to give the warnings directed by the United States Attorneys' Manual in the future, the government could expect that matter to be dealt with in this district sternly."[10] Tr. 413-14. Nonetheless, the district court

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[9]This finding was based on the testimony of Special Agent Charles Little, who testified that it was the practice and procedure of the United States Attorney's Office to send advice of rights forms with subpoenas. Transcript of March 11, 1991 pretrial hearings at pages 40-41. In spite of the fact that he had not personally served the subpoena (*Id.* at 39), Little stated that the subpoena copy in the government's file, which contained a check mark that the advice of rights form had been sent to petitioner, was exactly like the subpoena served on petitioner. *Id.* at 41.

[10]We note for the record that government counsel also failed to advise Fred and Ralph Perone on the record of their rights as grand jury witnesses. App. E, *infra*, 23a-24a, App. F, *infra*, 32a-33a, and App. G *infra*, 34a-35a.

concluded that failure of the government to follow the procedures of the United States Attorneys' Manual did not relieve the defendant from the charge of perjury in this case. Tr. 414.

The court of appeals conceded that "the better practice, of course, would have been for the prosecutor to specifically advise Torcasio of his rights on the record," but it found no abuse of discretion in the district court's ruling that petitioner had received adequate notice of his Fifth Amendment rights because they were outlined in material enclosed with Torcasio's grand jury subpoena. App. A, *infra*, 7a.

REASONS WHY THE WRIT SHOULD ISSUE

1. The judgment of the court of appeals, denying the petition for rehearing and suggestion for rehearing in banc in a case of extortion under color of official right where no *quid pro quo* was alleged or proven and where the district court's instruction specifically directed that a *quid pro quo* need not be proven, undermines this Court's decision in *Evans v. United States*, ___ U.S. ___, 112 S.Ct. 1881 (1992), which held that in all cases of extortion under color of official right, a *quid pro quo* must be proven.

This Court summarized its decision in *Evans v. United States*, in these words:

> We hold today that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.

Id. at 1889. Thus, this Court resolved two outstanding issues related to Hobbs Act extortion under color of official right: (1) whether inducement by the public

official is required and (2) whether the government must prove the existence of a *quid pro quo.* With respect to the issue of a *quid pro quo,* this Court clarified and extended its decision in *McCormick v. United States,* 500 U.S. ___ , 111 S.Ct. 1807 (1991), by holding that a *quid pro quo* is required for the conviction of a public official under the Hobbs Act. By its explicit holding, quoted above, this Court extended *McCormick*'s rationale to all payments received by public officials, not solely "campaign contributions" received by public officials.[11]

Mr. Justice Kennedy, in his concurring opinion, clarified the Court's finding even further:

> The requirement of a *quid pro quo* in a §1951 prosecution such as the one before us, in which it is alleged that money was given to the public official in the form of a campaign contribution, was established by our decision last term in *McCormick v. United States,* 500 U.S. ___ , 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). *Readers of today's opinion should have little difficulty understanding that the rationale underlying the Court's holding applies not only in campaign contribution cases, but all §1951 prosecutions.*

Id. at 1894. (Emphasis added.)

The court of appeals affirmed petitioner's convictions on March 11, 1992. Petitioner filed a petition for rehear-

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[11] In a blistering dissent, Mr. Justice Thomas, joined by Chief Justice Rehnquist and Mr. Justice Scalia, stated:

> Today's extension of *McCormick's* reasonable (but textually and historically artificial) *quid pro quo* limitation to *all* cases of official extortion is both unexplained and inexplicable – except insofar as it may serve to rescue the Court's definition of extortion from substantial overbreadth.

Id. at 1899.

ing and suggestion for rehearing in banc on March 24, 1992. Two days after this Court's decision in *Evans*, petition brought the *Evans* decision to the court of appeals' attention and suggested that, in light of this Court's decision in *Evans*, the district court's instruction that a *quid pro quo* need not be proven had been plain error and that petitioner's conviction for aiding and abetting extortion must be reversed. Petitioner cited to *Griffith v. Kentucky*, 479 U.S. 314, 329 (1987), which provides that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct appeal." App. D, *infra*, 21a. Without explanation and totally ignoring this Court's decision in *Evans*, the court of appeals denied petitioner's petition for rehearing and suggestion for rehearing in banc. App. B, *infra*, 10a.

In this case, the district court had specifically instructed the jury that a *quid pro quo*, an official action in return for the payment of money, was "not an essential element of the crime that the United States needs to prove." Tr. 874-75. Moreover, a *quid pro quo* in this case did not exist, and the government neither alleged nor proved a *quid pro quo*.

Accordingly, because of the court of appeals' decision in this matter conflicts with the decision of this Court in *Evans*, we respectfully request that this petition for writ of certiorari be granted.

2. The court of appeals' decision to refuse to apply the clear terms of Fed.R.Evid. 804(b)(1) relating to exculpatory grand jury testimony offered against the government of a witness made "unavailable" by invocation of his Fifth Amendment privilege conflicts with this Court's decision in *United States v. Salerno*, ___ U.S. ___ , 112 S.Ct. 2503 (1992) and at least three other circuits, including its own circuit.

Fed. R. Evid. 804(b)(1) provides that former testimony of an unavailable witness is not excluded as hearsay if it meets a number of requirements: the declarant must have testified "as a witness at another hearing," and "the party against whom the testimony is ***offered*** [must have] had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Fed.R.Evid. 804(b)(1).

The court of appeals skirted the issue and refused to apply the clear terms of Rule 804(b)(1). It simply stated that the district court had "left open the possibility of admitting the testimony during trial, [and that] the defense did not raise the issue again." App. A, *infra*, 7a. However, Rules 804(b)(1) and 804(b)(5) were the sole bases advanced for the admission of the grand jury testimony, and no factual developments in the trial could have made the grand jury testimony any more or less admissible. Under either of those evidentiary rules, no reason existed to raise the issue again. Although the court of appeals did not – and, in our view, could not – find that petitioner had abandoned the issue with the district court, the court of appeals, without explanation, decided "after reviewing the circumstances surrounding" the exclusion of the Perones' grand jury transcripts, that the trial court had not abused its discretion. App. A, *infra*, 7a.

Grand jury testimony is undoubtedly "former testimony" under Rule 804(b)(1). *See United States v. Vigoa*, 656 F. Supp. 1499, 1505 n.5 (D.N.J. 1987), *aff'd*, 857 F.2d 1467 (3d Cir. 1988). Moreover, the government clearly had "an opportunity or similar motive to develop the testimony" of the Perones in the grand jury. In this grand jury situation, the government had the full right and opportunity, as well as a similar motive, to interrogate the Perones in the grand jury.

Last term this Court considered this Rule 804(b)(1) issue in a similar context. *United States v. Salerno*, ___ U.S ___ , 112 S.Ct. 2503 (1992). In *Salerno*, the government had granted immunity to two witnesses to testify before the grand jury, but the witnesses denied knowledge of the racketeering enterprise the government had sought to prove. When the defense called the witnesses at trial, they asserted their Fifth Amendment privilege. The trial judge excluded the witnesses' grand jury testimony, reasoning that the similar motive requirement in Rule 804 had not been satisfied. The Second Circuit Court of Appeals reversed all convictions. This Court remanded the case to the court of appeals on June 19, 1992, for a determination of whether the government had had a similar motive to develop the unavailable witnesses' testimony in the grand jury as required by Rule 804(b)(1). On remand, the court of appeals again reversed the convictions, finding that "the government's examination of [the two exculpatory witnesses] was the equivalent of what would have been done if the opportunity to examine them had been presented at trial.*** We conclude that the government had a similar motive, which it in fact acted upon, to examine these witnesses before the grand jury; thus the grand jury testimony of [the two witnesses] should have been admitted under rule

804(b)(1)." *United States v. Salerno,* 1992 WESTLAW 203755 (2d Cir. August 17, 1992). *See also United States v. Miller,* 904 F.2d 65, 68 (D.C. Cir. 1990) (government had same motive and opportunity in grand jury as at trial); *United States v. Lester,* 749 F.2d 1288, 1301 (9th Cir. 1984) ("government had ample opportunity to cross-examine [witness] during the grand jury proceedings"); *United States v. Klauber,* 611 F.2d 512, 516-517 (4th Cir. 1979), *cert. denied,* 446 U.S. 908 (1980) (suggesting in *dicta* that it could "well imagine" that unavailable witness' prior grant jury testimony might have been admitted under Rule 804(b)(1) as having been given in a proceeding where the government "would have had an opportunity and similar motive to develop the testimony by direct examination.")

This case is on all fours with *Salerno* in that the government indisputably had a "similar motive" to develop the Perones' testimony which it did by vigorous examination in the grand jury. The Perones' former testimony was most certainly not tangential; their testimony implicated themselves in the precise series of events for which petitioner was on trial. Petitioner had maintained at the grand jury and at trial that he had neither hired nor paid Tonkovich the $15,000 at issue. App. C, *infra,* 13a-15a, 18a; Tr. 697. Ralph Perone testified in the grand jury that he and the corporate shareholders of WVCC, Inc., including his brother, Fred, but *not* including petitioner, had made the decision to hire Tonkovich and to authorize the payments to him. App. E, *infra,* 24a-31a. Fred Perone ultimately stated in his grand jury testimony that he and the other investors of which petitioners was *not* one, authorized and paid the $15,000 to Tonkovich. App. G, *infra,* 38a. The question of who hired and paid Tonkovich was absolutely critical to

petitioner's defense, and it is quite obvious that the Perones' statements exculpated appellant. Moreover, petitioner had clearly demonstrated that the excluded evidence was material to his defense, *viz.*, that the Perones had paid the $15,000 to Tonkovich for which petitioner was on trial.[12]

3. **The Supreme Court has never decided whether any Fifth Amendment warnings are constitutionally required for grand jury witnesses; such a requirement is particularly necessary where the prosecutorial misconduct is so unfair that it denies a defendant due process.**

In *United States v. Washington*, 431 U.S. 181 (1977), this Court stated that it

> has not decided that the grand jury setting presents coercive elements which compel witnesses to incriminate themselves. Nor have we decided whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses; moreover, we have no occasion to decide these matters today.

Id. at 186. The plurality and two concurring opinions in *United States v. Mandujano*, 425 U.S. 564 (1976), suggested in *dicta* that a court should overturn convictions in cases where the prosecutorial conduct is so unfair that it denies the defendant due process.[13] The plurality was

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[12]The court of appeals did not reach the constitutional issues of petitioner's rights to due process and to compel testimony. No rule of evidence may be construed to exclude reliable hearsay offered by a defendant who requires the evidence for his defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

[13]Mandujano had been subpoenaed to a grand jury to testify about narcotics traffic. The prosecutor warned him that he was not required to answer any questions that might incriminate him, that all other questions had to be answered truthfully

[footnote continued]

satisfied that Ray Mandujano, a putative defendant in a grand jury setting, had received adequate warnings by the prosecutor in the grand jury, even though the warnings were not as broad as those called for by *Miranda v. Arizona*, 384 U.S. 436 (1966):

> The fact that warnings were provided in this case to advise respondent of his Fifth Amendment privilege makes it unnecessary to consider whether any warning is required, as the Government asks us to determine. In addition to the warning implicit in the oath, federal prosecutors apparently make it a practice to inform a witness of the privilege before questioning begins.

United States v. Mandujano, 425 U.S. at 583 n.7. In his concurring opinion, Mr. Justice Brennan, joined by Mr. Justice Marshall, was satisfied that the grand jury proceeding in that case had met constitutional muster:

> Further, the record satisfies me that the respondent's false answers were not induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury [in] violation of the Due Process Clause of the Fifth Amendment.

Id. at 585. Mr. Justice Stewart, joined by Mr. Justice Blackmun, agreed that the case before them was not so egregious as to require reversal of Mandujano's convictions:

> Since this is not a case where it could plausibly be argued that the perjury prosecution must be barred

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or else he would be subject to a charge of perjury, and that if he desired a lawyer, he could have one outside the grand jury room. Mandujano was subsequently charged with perjury for his admittedly false statements made to the grand jury about his involvement in an attempted heroin sale.

> because of prosecutorial misconduct amounting to a denial of due process, I would reverse the judgment [of the Fifth Circuit suppressing Mandujano's grand jury testimony] without reaching the other issues explored by the Chief Justice's opinion and in Mr. Justice Brennan's separate opinion.

Id. at 609.

In distinct contrast to Mandujano's treatment in the grand jury, petitioner was never advised on the record of his rights as a witness in the grand jury, was never told that he was a target of the grand jury's investigation, and was subjected to prejudicial questioning by the prosecutors who attempted to link him to drug trafficking and organized crime. The prosecutors even failed to comply with Department of Justice policy, as enunciated at Section 9-11.150 of the United States Attorneys' Manual, that every "target" or "subject" of a grand jury investigation be advised of certain Fifth Amendment rights.

Here, petitioner's grand jury transcript supports the conclusion that the prosecutors' deliberately unfair and inflammatory conduct (App. C, *infra*, 15a-17a), combined with their failure to advise petitioner of his target status and his rights as a grand jury witness, undermined the fundamental fairness of the grand jury proceeding. *See United States v. Samango*, 607 F.2d 877, 883 (9th Cir. 1979) (narcotics indictment dismissed when prosecutor's interrogation of defendant deliberately designed to prejudice him); *United States v. Serubo*, 604 F.2d 807, 814-819 (3d Cir. 1979) (court condemned questions insinuating the defendant was connected with organized crime); *United States v. Jacobs*, 547 F.2d 772, 775 (2d Cir. 1976) (defendant's grand jury testimony suppressed

and perjury conviction reversed for failure to advise defendant of target status.)

Accordingly, because of its coercive tactics, the government should have been required to warn petitioner of his Fifth Amendment rights, and failure to do so should result in suppression of the grand jury testimony.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

MARTHA PURCELL ROGERS
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1333 New Hampshire Avenue, N.W.
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(202) 862-2424
Counsel for Petitioner.

October 26, 1992

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 1992, three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit were sent by first class mail, postage prepaid, to:

Michael W. Carey, Esq.
Michael L. Keller, Esq.
John P. Rowley, III, Esq.
United States Attorney's Office
Southern District of West Virginia
Post Office Box 3234
Charleston, West Virginia 25332

Martha P. Rogers

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5316

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY THOMAS TORCASIO,
Defendant-Appellant.

Argued Dec. 6, 1991
Decided March 11, 1992

OPINION

PER CURIAM:

Anthony Torcasio was indicted for paying $17,000 to a West Virginia state senator for the purpose of influencing the passage of a statute that would legalize gambling in the state. After a four-day trial, Torcasio was convicted of aiding and abetting West Virginia Senate President Daniel Tonkovich, who earlier pleaded guilty to committing extortion in violation of the Hobbs Act. 18 U.S.C. §1951.[1] Torcasio was also convicted of one

[1] The Hobbs Act, codified at 18 U.S.C. §1951, states, in pertinent part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in com-

[footnote continued]

count of perjury for lying to a grand jury, in violation of 18 U.S.C. §1623. The district court sentenced Torcasio to thirty-six months in prison, to a twenty-four month concurrent sentence for the perjury violation, and fined him $5000. On appeal Torcasio raises issues pertaining to sufficiency of evidence, exclusion and inclusion of evidence, jury instructions, and the sentence. We affirm on all issues but remand for resentencing.

I

During its winter session of 1986, the West Virginia Legislature was scheduled to consider whether the state should legalize gambling. Prior to that, in 1985, Torcasio, who had worked in New Jersey's legalized gambling business for years, began advising a small group of investors who hoped to operate a gambling casino in Weirton, West Virginia. Also prior to the legislative session, in November 1985, Tonkovich met with the same investors to discuss the economic benefits of legalized gambling. Then, in December 1985, at a similar meeting of invest-

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merce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section — . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Torcasio was charged under 18 U.S.C. §2(a) which provides in part that

[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

ors, Tonkovich and Torcasio met for the first time. Fred Perone, one of the investors, inquired whether Tonkovich, who owned a small public relations firm, would be interested in mounting a public relations campaign directed to increase public interest in legalized gambling; Tonkovich declined. According to Tonkovich, after the meeting Torcasio tried to give him a cash campaign contribution which he refused. Torcasio, however, denied at trial the attempt to give Tonkovich money.

A month later, at another meeting of the investors attended by Tonkovich, a second public relations firm presented a proposal to perform services for the would-be gambling organization. Tonkovich testified that after the meeting, Torcasio asked to speak to Tonkovich in private. According to Tonkovich's testimony, Torcasio complained that the services proposed by the other firm were too expensive and asked Tonkovich to be the investor's in-state business consultant. Tonkovich testified that they agreed on a $15,000 contract which Tonkovich suggested be put in the name of Robert Cain, Tonkovich's administrative assistant. Torcasio denies that this encounter occurred, and two witnesses corroborated his testimony that he left immediately after the business meeting.

Tonkovich testified that, as a result of the agreement with Torcasio, he then drafted a handwritten contract. The contract was given to Robert D'Anniballe, the investors' attorney, who, after changing some of its provisions, returned a typed contract to Tonkovich. The final version called for three $5,000 payments in exchange for public relations work done from February through March of 1986. All three payments were made to Cain by D'Anniballe in February; Cain transferred $11,400 to Tonkovich, retaining $3,600 to pay the

income tax due because the checks had been payable to him.

Tonkovich also testified that in February 1986, Torcasio gave him $1,000 in cash for his newborn son. Tonkovich also claimed at trial that in May 1986, Torcasio gave him an additional $1,000 in cash as a Mother's Day gift for his wife. Torcasio denies making both payments. In June 1986, Tonkovich became apprehensive when *The Charleston Gazette* published articles which questioned his outside business activities and raised the issue of extortion. Consequently, he returned the $1,000 Mother's Day gift by a check which was never cashed and was returned to him. He also returned, through Cain, the $15,000.

II

Torcasio argues that the evidence was insufficient to establish that he paid money with the expectation that he would receive some benefit from Tonkovich, as required by the Hobbs Act. *See United States v. Paschall,* 772 F.2d 68, 71-72 (4th Cir. 1985), *cert. denied,* 475 U.S. 1119, 106 S.Ct. 1635, 90 L.Ed.2d 181 (1986). He emphasizes the evidence that tends to prove that the contract was legitimate. There was, of course, evidence to that effect, but the task of resolving conflicting testimony and the permissible inferences flowing from such evidence belong to the factfinder. We review the evidence in the light most favorable to the government. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Sherman,* 421 F.2d 198, 199 (4th Cir.), *cert. denied,* 398 U.S. 914, 90 S.Ct. 1717, 26 L.Ed.2d 78 (1970). Applying this standard, we are persuaded that there was

sufficient evidence from which a reasonable juror could conclude that Torcasio either arranged to pay or paid Tonkovich with the expectation of obtaining favorable action in the senate vote on legalized gambling.

Likewise, we find no merit to Torcasio's contention that the recent Supreme Court decision in *McCormick v. United States*, ___ U.S. ___, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991), requires the government to prove here a specific *quid pro quo*. We do not think *McCormick* went so far. In fact, the Court in *McCormick* considered only campaign contributions, expressly declining to decide whether its ruling applied to any other kind of payments. *See McCormick*, ___ U.S. at ___, n.10, 111 S.Ct. at 1817, n.10. In reaching its conclusion, the Court relied on the relation between political campaign contributions and a realistic assessment of the political process that makes campaign funds necessary and legitimate. *See McCormick*, ___ U.S. at ___, 111 S.Ct. at 1817. As the Supreme Court indicated, imposing the *quid pro quo* requirement in the area of campaign contributions balances the interest in public integrity with the practical demands of democrary and avoids criminalizing legitimate behavior.[2] In contrast, this case does not involve

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[2]The Court in *McCormick*, of course, did not exempt campaign contributions from the Hobbs Act; the Court stated that it is possible for an elected public official to commit extortion in the course of financing an election campaign. *McCormick*, ___ U.S. at ___, 111 S.Ct. at 1877. The Court held that, when the payments to an official are campaign contributions, the government must prove that the money was given in return for an explicit promise to perform or not to perform an official act. *Id.* Specifically, it said that such payment is vulnerable under the Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act. In such situa-

[footnote continued]

an effort to finance Tonkovich's future political campaigns. It simply involves investors in a gambling enterprise who were trying to have gambling legalized in a state where it was illegal.

Similarly, we find no error in the district court's rulings on three evidentiary issues. With regard to these rulings, Torcasio first argues that the court erred in refusing to admit a statement which Fred Perone made to New Jersey gaming enforcement officials. Perone, who owned a New Jersey gambling license, was interviewed by New Jersey agents in connection with possible wrongdoing in West Virginia. He told the investigators that he had paid $15,000 to Tonkovich – one of the payments at issue in Torcasio's trial – to do public relations work for the investors' potential casino. Although the statement was hearsay, Torcasio argued that it fell within the hearsay exception for statements against interest. *See* Federal Rule of Evidence 804(b)(3). The district court disagreed, finding the statement was not against Perone's penal interest because the admission that he had hired Tonkovich to do public relations work could not have resulted in any adverse consequence to Perone. We find no abuse of discretion in this conclusion of the district court.

Torcasio next argues that the district court committed error by refusing to admit the grand jury testimony of Fred Perone and his brother and fellow investor, Ralph Perone. They had testified that the investors decided to hire Tonkovich's firm and authorized the investors'

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tions the official asserts that his official conduct will be controlled by the terms of the promise or undertaking. This is the receipt of money by an elected official under color of official right within the meaning of the Hobbs Act.
Id.

lawyer to pay for the firm's services. At a hearing on the government's motion *in limine* the court indicated it would exclude the grand jury testimony because "the hearing has indicated no basis for the admissibility of the grand jury testimony." Although the court left open the possibility of admitting the testimony during trial, the defense did not raise the issue again. After reviewing the circumstances surrounding both of these exclusions, we are not persuaded that the district court abused its discretion in either instance.

Torcasio also claims that the district court erred by denying his motion *in limine* to suppress his own grand jury testimony because he was unrepresented by counsel and was neither informed that he was a target of the grand jury investigation nor advised on the record of his constitutional rights. Although the better practice, of course, would have been for the prosecutor to specifically advise Torcasio of his rights on the record, we find no abuse of discretion in the court's ruling that Torcasio had received adequate notice of his Fifth Amendment rights because they were outlined in material enclosed with Torcasio's grand jury subpoena.

We next consider Torcasio's contentions of error regarding two of the trial court's instructions to the jury. He first attacks the district court's instruction that it was not necessary for the government to have proved that Tonkovich overtly solicited the payments. He concedes that while this circuit recognizes the Hobbs Act's requirement of proof of inducement, we have held that the government need not show that the public official overtly solicited the payment. *See United States v. Paschall, supra* at 71. He urges, however, that *Paschall* be overruled. Even were we so inclined, that course of action "lies beyond our province as a panel of this court. . . ."

Caldwell v. Ogden Sea Transport, Inc., 618 F.2d 1037, 1041 (4th Cir. 1980); *see also North Carolina Utilities Commission v. Federal Communications Commission*, 552 F.2d 1036, 1044, n.8 (4th Cir.), *cert. denied*, 434 U.S. 874, 98 S.Ct. 222, 54 L.Ed.2d 154 (1977).

Torcasio also complains that the district court erred in not instructing the jury that they must unanimously agree that Torcasio made at least one of the three payments. The court's complete charge to the jury included instructions that, "[I]n order to return a verdict, it is necessary that each juror agree to it. Your verdict then must be unanimous." The court also subsequently instructed the jury to "[b]ear in mind that you are not to reveal to anyone, not even the court, how you stand numerically or otherwise on the guilt or innocence of the accused until you have reached a unanimous verdict." Torcasio argues that because the indictment and the complexity of the evidence could create uncertainty and confusion regarding the factual basis for the conviction, the district court erred by not instructing the jury that it was necessary to reach a unanimous verdict on at least one of the three discrete payments.

Torcasio did not offer such an instruction at trial nor did he object to the court's failure to give such an instruction. He contends, however, on appeal that the district court committed plain error. It is true that circumstances in many trials require specific unanimity instructions, *see United States v. North*, 910 F.2d 843, 876 (D.C. Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2235, 114 L.Ed.2d 477 (1991) (in case involving multiple false statement charges jury must be given special unanimity instruction), and *United States v. Payseno*, 782 F.2d 832, 837 (9th Cir. 1986) (to convict on extortion charge where separate victims, times, and locations involved,

special unanimity charge required). In our view, however, such special circumstances were not present here. The multiple acts alleged are based on an ongoing set of dealings between two individuals, Torcasio and Tonkovich, and practically all of the convicting evidence was given by one of the participants, Tonkovich. There was little, if any, chance of jury confusion, and we are not persuaded that the failure to give an additional unanimity instruction relating to each of the payments was clear error.

Although we affirm the judgment, it is necessary, in view of our recent decision in *United States v. Dunnigan*, 944 F.2d 178 (4th Cir. 1991), to remand to the district court for resentencing. In *Dunnigan*, decided after Torcasio's trial, we held that an upward adjustment for testimonial denial of guilt under Guideline §3C1.1 of the United States Sentencing Guidelines is unconstitutional. *Dunnigan*, 944 F.2d at 185.

We, therefore, remand with instructions to the district court to reduce Torcasio's Guideline offense level by two points and to resentence based on that offense level determination. The government at resentencing will not be permitted to seek alternative enhancement.[3]

In view of the above, the judgment of conviction is affirmed, but the case is remanded for resentencing.

CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING.

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[3] On appeal, the government argued that on remand it should be allowed to seek an enhancement for obstruction of justice for subordination of perjury. The government claims that Torcasio may have induced his trial witnesses to perjure themselves or committed other acts giving rise to further enhancement. We reject that suggestion. This remand is for the limited purpose of reducing the offense level and resentencing.

APPENDIX B

[Filed August 6, 1992]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-5316
CR-90-259-2

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY THOMAS TORCASIO,
Defendant-Appellant.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Luttig and Senior Judge Butzner.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

Criminal Matter No. 86R0277

IN RE: GRAND JURY PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS HAD AND TESTIMONY OF

ANTHONY THOMAS TORCASIO

ADDUCED ON JANUARY 5, 1989, IN THE GRAND JURY ROOM, FEDERAL BUILDING, FEDERAL STREET, BLUEFIELD, WEST VIRGINIA.

APPEARANCES:

WAYNE A. RICH, JR., ESQUIRE
ASSISTANT UNITED STATES ATTORNEY

NANCY C. HILL, ESQUIRE
ASSISTANT UNITED STATES ATTORNEY

[3] PROCEEDINGS

(WITNESS SWORN; 9:41 A.M.)

THEREUPON CAME

ANTHONY THOMAS TORCASIO,

CALLED AS A WITNESS, WHO, HAVING BEEN FIRST DULY SWORN ACCORDING TO LAW, TESTIFIED AS FOLLOWS:

THE FOREPERSON: STATE YOUR NAME, PLEASE.

THE WITNESS: ANTHONY TORCASIO.

EXAMINATION

BY MS. HILL:

Q. WOULD YOU SPELL YOUR LAST NAME, SIR?

A. T-O-R-C-A-S-I-O.

Q. IS YOUR FULL NAME ANTHONY TORCASIO?

A. YES, MA'AM.

Q. DO YOU HAVE A MIDDLE NAME?

A. TONY – THOMAS.

Q. PARDON ME?

A. THOMAS IS MY MIDDLE NAME.

Q. SO, IT'S ANTHONY THOMAS TORCASIO?

A. YES, MA'AM.

Q. ARE YOU KNOWN TO YOUR FRIENDS AS TONY?

A. YES, MA'AM.

Q. WHERE DO YOU LIVE? WHAT IS YOUR ADDRESS RIGHT [4] NOW?

A. 3212 LONGPORT – MONMOUTH AVENUE, LONGPORT, NEW JERSEY.

Q. WHAT IS THE ZIP CODE?

A. IT'S 08403.

Q. WHAT IS YOUR PHONE NUMBER AT THAT RESIDENCE?

A. IT'S 487-8129, AREA CODE (609).

Q. HOW LONG HAVE YOU LIVED AT THAT LOCATION?

A. TWO (2) YEARS.

Q. PRIOR TO THAT TIME, WHERE DID YOU LIVE?

A. I LIVED IN LINWOOD, NEW JERSEY.

Q. WHAT WAS YOUR ADDRESS THERE?

A. IT'S 100 MORRIS AVENUE.

Q. AND WHAT WAS YOUR PHONE NUMBER AT THAT TIME, AT THAT ADDRESS?

A. IT'S 927-8129.

Q. AND ARE YOU EMPLOYED AT THIS TIME?

A. I'M A CONSULTANT. I HAVE AN OFFICE AS A CASINO CONSULTANT.

Q. HAVE YOU BEEN SELF-EMPLOYED FOR SOME PERIOD OF TIME?

A. WELL, I CAME BACK AND I WAS EMPLOYED BY PENTHOUSE.

* * *

[38] Q. DID YOU OFFER DAN TONKOVICH – DID YOU PERSONALLY OFFER DAN TONKOVICH ANY SUM OF MONEY FOR HIS ASSISTANCE IN GETTING CASINO GAMBLING LAWS PASSED IN THE STATE OF WEST VIRGINIA?

A. ME, PERSONALLY?

Q. YES.

A. NEVER.

Q. DID ANYONE, TO YOUR KNOWLEDGE, DURING THE PERIOD OF TIME THAT WE ARE DISCUSSING OR ANY PERIOD OF TIME, FOR THAT MATTER, OFFER DAN TONKOVICH ONE (1) RED CENT FOR HIS ASSISTANCE IN GETTING CASINO GAMBLING –

A. NOT TO MY KNOWLEDGE.

Q. – LAWS PASSED IN THE STATE OF WEST VIRGINIA?

A. NOT TO MY KNOWLEDGE.

Q. DID YOU OFFER DAN TONKOVICH ANY MONEY FOR ANY PURPOSE? EVER IN YOUR LIFE, HAVE YOU?

A. NO.

Q. IS THAT A WIDE-ENOUGH QUESTION? HAVE YOU EVER OFFERED HIM ANY MONEY FOR ANYTHING – DAN TONKOVICH?

A. OFFERED HIM –

Q. ANY MONEY FOR ANY PURPOSE AT ALL – YOU, [39] PERSONALLY.

A. I NEVER PERSONALLY GAVE DAN TONKOVICH NO MONEY.

EXAMINATION

BY MR. RICH:

Q. DO YOU KNOW ANYBODY THAT HAS?

A. NO.

EXAMINATION

BY MS. HILL:

Q. DID YOU HAVE ANY DISCUSSIONS WITH DAN TONKOVICH ABOUT PAYING HIM FIFTEEN THOUSAND DOLLARS ($15,000) FOR ANY REASON?

A. NO.

Q. DID YOU HAVE ANY DISCUSSIONS WITH DAN TONKOVICH ABOUT WVCC PAYING HIM FIFTEEN THOUSAND DOLLARS ($15,000)?

A. NO, MA'AM.

Q. DID YOU HAVE ANY – DO YOU HAVE ANY KNOWLEDGE HERE TODAY THAT DAN TONKOVICH RECEIVED ANY MONEY, DIRECTLY OR INDIRECTLY, FROM WVCC, INC.?

A. NO, MA'AM.

Q. DO YOU HAVE ANY KNOWLEDGE HERE TODAY THAT DAN TONKOVICH EVER RECEIVED ANY MONEY, DIRECTLY OR INDIRECTLY, FROM ROBERT D'ANNIBALLE, THE ATTORNEY WHO REPRESENTED WVCC, INC.?

[40] A. THE ONLY THING I KNOW OF, MS. HILL, WHICH I TOLD YOU AND MR. LITTLE UP THERE, IS ABOUT THAT CHECK THAT WAS SENT TO A CONSULTANT FIRM THAT HE WAS SUPPOSED TO BE INVOLVED WITH –

Q. WHAT CHECK?

A. – FOR SOME KIND OF CONSULTING OR P.R. WORK, WHICH I DIDN'T KNOW NOTHING ABOUT UNTIL ABOUT A MONTH AFTER IT HAPPENED. AND THEN –

Q. YOU ARE SAYING NOW THAT YOU KNOW THAT DAN TONKOVICH RECEIVED A CHECK FROM SOME CONSULTANT –

A. NOT DAN TONKOVICH. SOME FIRM THAT HE WAS SUPPOSED TO BE INVOLVED WITH THAT WAS A P.R. FIRM OR SOMETHING.

Q. WELL, YOU SAY THAT YOU TOLD THIS TO US BEFORE. ARE YOU SAYING THAT YOU TOLD MR. RICH AND MR. LITTLE AND I BEFORE WE CAME INTO THE GRAND JURY ROOM ABOUT THIS CHECK?

A. THAT ROBERT D'ANNIBALLE HAD SENT A CHECK OUT – ORDERED BY THE PERONES, I THINK IT WAS.

* * *

[56] Q. ISN'T IT TRUE THAT IF THAT IS TRUE, THAT IF A FIVE THOUSAND DOLLAR ($5,000) CHECK WAS PAID TO ROBERT CAIN DURING THE TIME PERIOD THAT YOU ALL WERE TRYING TO GET CASINO GAMBLING PASSED IN THE STATE OF WEST VIRGINIA, THAT WOULD BE A BRIBE, WOULDN'T IT?

A. LIKE I SAID, MS. HILL, I AM NOT AN ATTORNEY.

Q. IT DOESN'T TAKE AN ATTORNEY TO FIGURE THAT OUT, DOES IT?

A. LIKE I TOLD YOU, I TOLD THEM THAT I WOULD NEVER HAVE DONE IT.

Q. YEAH. YOU WOULD HEVER DO SUCH A THING BECAUSE YOU KNOW IT'S ILLEGAL, RIGHT?

A. YES, MA'AM.

Q. BUT YOU JUST TOLD US THAT THEY ADMITTED TO YOU THAT THEY DID IT?

A. THEY CLAIMED THAT THEY HAD SAID THERE WAS NO CONFLICT OF INTEREST THERE. THAT'S EXACTLY WHAT –

Q. YOU KNEW BETTER THAN THAT, RIGHT?

[57] A. I THINK THAT THERE IS A CONFLICT OF INTEREST.

EXAMINATION

BY MR. RICH:

Q. THESE ARE NEW JERSEY JUDGES TELLING YOU THAT?

A. YES, SIR.

Q. WHAT KIND OF A JUSTICE SYSTEM HAVE YOU GOT UP IN NEW JERSEY?

* * *

[63] Q. YOU ARE GOING TO TEACH THE SONS AND DAUGHTERS OF WEST VIRGINIANS HOW TO RUN A GAMBLING OPERATION?

A. PARDON?

Q. THAT'S WHAT YOU WANTED TO DO? YOU WANTED TO TEACH THE SONS AND DAUGHTERS OF WEST VIRGINIA HOW TO RUN A GAMBLING OPERATION?

A. TO INSTRUCT THEM NOW TO HAVE A SCHOOL, A GAMING SCHOOL.

Q. YOU THOUGHT THAT WOULD BE A GOOD THING FOR THE STATE OF WEST VIRGINIA?

A. WELL, IF THERE'S UNEMPLOYMENT, IT'S JOBS.

Q. UH-HUH. DEALING DOPE IS A JOB, TOO, ISN'T IT?

A. NO. I DON'T BELIEVE IN DEALING DOPE. I HAVE TWO (2) KIDS, SIR, AND I BELIEVE THAT ANYBODY THAT DEALS DOPE, THEY SHOULD TAKE THEM OUT AND DON'T EVEN HAVE A TRIAL FOR THEM.

Q. DO YOU THINK ORGANIZED CRIME IS INVOLVED IN CASINO GAMBLING?

[64] A. WELL, I WAS NEVER INVOLVED WITH ORGANIZED CRIME.

Q. THAT'S NOT MY QUESTION.

A. THEY COULD BE.

Q. COULD BE. ISN'T ORGANIZED CASINO GAMBLING THE LIFEBLOOD OF ORGANIZED CRIME? ISN'T THAT HOW THEY LAUNDER THEIR MONEY?

A. WELL, A LOT OF CORPORATIONS ARE IN IT NOW, LIKE I OPENED THE MGM IN LAS VEGAS.

Q. MY QUESTION IS: ISN'T CASINO GAMBLING THE WAY ORGANIZED CRIME LAUNDERS THEIR MONEY? YOU KNOW THAT, DON'T YOU?

A. THEY SAY THEY DO.

Q. YES, OKAY. AND THAT'S JUST WHAT WE NEED IN THE STATE OF WEST VIRGINIA, ISN'T IT?

A. I DON'T THINK YOU WILL EVER SEE GAMBLING IN THE STATE OF WEST VIRGINIA.

Q. BECAUSE THE CITIZENS ARE TOO SMART TO BRING IT IN HERE, AREN'T THEY?

A. WELL, IF THEY DON'T WANT IT, THAT'S THEIR PRIORITY. SO –

Q. THAT'S WHY IT WAS IMPORTANT FOR YOU ALL TO PAY DAN TONKOVICH, BECAUSE YOU NEEDED HIS SUPPORT AS THE SENATE PRESIDENT TO GET THAT LEGISLATION PASSED? ISN'T THAT A FACT?

[65] A. I NEVER PAID DAN TONKOVICH A PENNY AND NEVER OFFERED HIM A PENNY.

Q. ISN'T THAT WHY IT WAS IMPORTANT FOR PEOPLE ON BEHALF OF WVCC TO PAY DAN TONKOVICH, BECAUSE WVCC AND OTHER GAMBLING INTERESTS – OR THOSE INTERESTED IN ESTABLISHING CASINO GAMBLING IN WEST VIRGINIA NEEDED DAN TONKOVICH'S SUPPORT TO GET THAT BILL PASSED?

A. SIR, LIKE I SAID, THAT CHECK THAT WAS SENT DOWN THERE, I KNEW NOTHING ABOUT.

Q. YOU'RE NOT SAYING THAT'S THE ONLY CHECK THAT WAS EVER PAID TO DAN TONKOVICH, DIRECTLY OR INDIRECTLY, ARE YOU?

A. PARDON?

Q. ARE YOU SAYING THAT THAT'S THE ONLY CHECK THAT YOU EVER HEARD THAT WENT DOWN?

A. I DON'T KNOW NOTHING ABOUT ANY OTHER CHECKS.

Q. HAVE YOU BEEN TOLD ANYTHING ABOUT ANY OTHER CHECKS?

A. NO, SIR.

* * *

APPENDIX D

CADWALADER, WICKERSHAM & TAFT
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 862-2200

Martha P. Rogers
202-862-2424

May 28, 1992

BY FEDERAL EXPRESS

Honorable Bert Montague
Acting Clerk
United States Court of Appeals
for the Fourth Circuit
Tenth and Main Streets
Richmond, VA 23219

RE: *United States v. Anthony Thomas Torcasio*
Appeal No. 91-5316

Dear Mr. Montague:

As an aid to the Court, we bring to its attention two matters decided by the United States Supreme Court on May 26, 1992, which impact on the above-styled case, currently before this Court.[1]

First, the Supreme Court decided *Evans v. United States*, No. 90-6105, a case concerning extortion under color of official right (18 U.S.C. §1951, known as the

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[1] This Court affirmed Appellant's convictions for aiding and abetting extortion and for false declaration before a grand jury on March 11, 1992. Appellant filed a Petition for Rehearing and Suggesting for Rehearing in Banc on March 24, 1992. The government's Motion to Stay Mandate was granted by this Court on March 26, 1992.

Hobbs Act). (Exhibit 1.) The Supreme Court gave a summary of its decision in these words:

> We hold today that the government need only show that a public official has obtained a payment to which he was not entitled, *knowing that the payment was made in return for official acts.*

(Exhibit 1, Opinion at 13, emphasis added.)

Thus, the Supreme Court resolved two outstanding issues relating to Hobbs Act extortion under color of official right: (1) whether inducement by the public official is required and (2) whether the government must prove the existence of a *quid pro quo*. The Supreme Court resolved a conflict in the circuits by deciding that an act of inducement by the public official was *not* required for conviction of a Hobbs Act extortion under color of official right.[2] (Exhibit 1, Opinion at 1, 13.) With respect to the issue of a *quid pro quo*, the Supreme Court clarified and extended its decision in *McCormick v. United States*, 500 U.S. ___, 111 S.Ct. 1807 (1991), by holding that a *quid pro quo* was required for the conviction of a public official under the Hobbs Act. By its explicit holding, quoted above, the Supreme Court extended *McCormick*'s rationale to all cases of official extortion.[3] The Court further stated that "the offense

---

[2] Appellant here had argued that the Hobbs Act should require proof that the public official induced the improper payments.

[3] In a blistering dissent, Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, stated:

> Today's extension of *McCormick*'s reasonable (but textually and historically artificial) *quid pro quo* limitation to *all* cases of official extortion is both unexplained and inexplicable – except insofar as it may serve to rescue the Court's definition of extortion from substantial overbreadth.

(Exhibit 1, Dissenting opinion at 10, emphasis in original.)

[of extortion under color of official right] is completed at the time when the public official receives a payment in return for his agreement *to perform specific official acts*; . . . ." (Exhibit 1, Opinion at 13, emphasis added.)

In its opinion in this case, this Court found no merit in Appellant's argument that a *quid pro quo* was required and concluded that *McCormick* did not require "the government to prove here a specific *quid pro quo*" (4th Cir. Op. at 4.), that is, that Torcasio made payments to Tonkovich in return for Tonkovich's promise to assist in the passage of legalized gambling. Relying on *McCormick*, Appellant had argued that the district court had erred by instructing the jury that the government did not have to prove a *quid pro quo*. (Appellant's Brief at 21-24, Appellant's Petition for Rehearing and Suggesting for Rehearing in Banc at 7-9.) Moreover, the government's proof at trial never suggested that there was any promise of specific action by Tonkovich in return for the money, instead relying on the theory that the alleged payments from appellant and WVCC were merely to secure "access and influence" with Tonkovich (J.A. 102). Tonkovich freely admitted that neither appellant nor WVCC ever asked him to change his position of opposition to casinio gambling legislation, or to do anything improper (J.A. 122, 141).

In light of the Supreme Court's decision in *Evans* extending *McCormick*'s *quid pro quo* requirement to all cases of Hobbs Act extortion under color of official right, the district court's instruction was plain error and Appellant's conviction for aiding and abetting extortion must be reversed.[4]

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[4] *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), provides that a "new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases pending on direct appeal."

Secondly, the Supreme Court granted *certiorari* in *United States v. Dunnigan*, No. 91-1300 on May 26, 1992. (Exhibit 2, Order List.) Pursuant to the Order of this Court on March 26, 1992, the mandate in this case was stayed "pending conclusive action by the Supreme Court in *United States v. Dunnigan*." Since the Supreme Court has agreed to hear argument in *Dunnigan*, we assume the mandate is stayed until the Supreme Court renders its decision in that mattter.

Thank you.

Sincerely,
/s/ Martha P. Rogers
Martha P. Rogers
Counsel for Appellant
Anthony Thomas Torcasio

MPR/ms
Enclosures
cc: Mr. Anthony T. Torcasio
John P. Rowley, Esq.
Michael L. Keller, Esq.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

Criminal Matter No. 86R0277

IN RE: GRAND JURY PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS HAD AND TESTIMONY OF

A. RALPH PERONE

ADDUCED ON FEBRUARY 14, 1989, IN THE GRAND JURY ROOM, FEDERAL BUILDING, FEDERAL STREET, BLUEFIELD, WEST VIRGINIA.

APPEARANCES:
MICHAEL W. CAREY, ESQUIRE
UNITED STATES ATTORNEY

[3] PROCEEDINGS
(WITNESS SWORN; 1:53 P.M.)

THEREUPON CAME

A. RALPH PERONE,

CALLED AS A WITNESS, WHO, HAVING BEEN FIRST DULY SWORN ACCORDING TO LAW, TESTIFIED AS FOLLOWS:

THE FOREPERSON: STATE YOUR NAME, PLEASE.
THE WITNESS: A. RALPH PERONE.

EXAMINATION

BY MR. CAREY:
Q. WHERE DO YOU LIVE, MR. PERONE?

A. 5 SOUTH CLAIRMONT AVENUE, MARGATE, NEW JERSEY.

Q. ARE YOU RELATED TO THE FRED PERONE WHO JUST APPEARED BEFORE THE GRAND JURY?

A. YES. HE'S MY BROTHER.

Q. IS HE YOUR OLDER BROTHER OR YOUNGER BROTHER?

A. HE'S MY OLDER BROTHER – BY FOUR (4) YEARS.

Q. I DIDN'T WANT TO PRESUME ANYTHING.

THIS GRAND JURY IS CONDUCTING AN INVESTIGATION INTO VARIOUS TRANSACTIONS INVOLVING AN ENTITY BY THE NAME OF WVCC, INC., DOING BUSINESS AS THE GRANDE HOTEL.

YOU HAD AN INTEREST IN THAT ENTITY, DID YOU NOT, SIR?

* * *

[24] Q. ALL RIGHT, SIR. AND WHAT FIRM DID YOU THINK WAS HIRED TO DO THE PUBLIC RELATIONS WORK FOR THE HOTEL?

A. THERE WAS – LIKE I SAY, WHEN I FIRST MET WITH SENATOR TONKOVICH, I BELIEVE, OR AT THE SECOND MEETING – I'M NOT SURE WHEN I HAD SPOKEN WITH HIM – I HAD ASKED WHAT HE HAD DONE.

AND HE SAID HE WAS INVOLVED IN PUBLIC RELATIONS. AND HE MENTIONED SOME RESORT WHERE HE WAS INVOLVED IN PUBLIC RELATIONS, SNOWSHOE OR SNOWFOOT OR SOMETHING OF THAT NATURE.

AND THEN, WHEN WE WERE INVOLVED, I THOUGHT MYSELF THAT WE HAD HIRED HIS FIRM.

Q. YOU THOUGHT YOU HAD HIRED MR. TONKOVICH'S FIRM?

A. YES.

Q. WHAT WAS THE NAME OF THAT FIRM, IF YOU KNOW?

A. I DON'T KNOW.

Q. DOES THE NAME INSIGHT AND IMAGE MEAN ANYTHING TO YOU?

A. NO, IT DOESN'T.

Q. HAVE YOU EVER HEARD OF IT?

A. I THOUGHT HE WAS AN EMPLOYEE OF A PUBLIC RELATIONS FIRM.

Q. YOU THOUGHT YOU HAD HIRED MR. TONKOVICH'S FIRM?

[25] A. YES.

Q. HOW DID YOU COME TO BELIEVE THAT?

A. WELL, WE WERE HIRING A PUBLIC RELATIONS FIRM. HE SAID HE DID PUBLIC RELATIONS WORK, AND HE IMPRESSED ME AS BEING A KNOWLEDGEABLE INDIVIDUAL.

AND I THOUGHT THAT THAT WAS THE FIRM WE WERE HIRING. I DON'T KNOW MR. CAIN.

Q. MY QUESTION IS: WHY DID YOU BELIEVE THAT YOU WERE HIRING MR. TONKOVICH'S FIRM? WHAT LED YOU TO THAT BELIEF? DID YOU SIGN ANY LETTERS TO MR. TONKOVICH? DID YOU ENTER INTO ANY AGREEMENTS WITH MR. TONKOVICH?

A. NO, NO. JUST – I THOUGHT THAT MR. TONKOVICH WAS INVOLVED IN PUBLIC RELATIONS, AND WE NEEDED PUBLIC RELATIONS PERSONNEL, AND I THOUGHT THAT WAS THE FIRM WE HIRED.

Q. WHY DID YOU THINK THAT?

A. BECAUSE MY INITIAL MEETING – I MET WITH THE SENATOR AT A DINNER AND A LUNCHEON.

I KNEW HE WAS INVOLVED WITH PUBLIC RELATIONS. WHEN WE HIRED A PUBLIC RELATIONS OUTFIT, I JUST ASSUMED THAT IT WAS THE SENATOR'S.

Q. WHY DID YOU ASSUME THAT?

A. THAT'S THE ONLY FIRM I KNEW.

Q. WHO TOLD YOU THAT YOU WERE HIRING A PUBLIC RELATIONS FIRM?

[26] A. WE DECIDED TO HIRE A PUBLIC RELATIONS FIRM.

Q. WHO IS "WE"?

A. THE CORPORATION.

Q. WELL, WHAT INDIVIDUALS? A CORPORATION SIMPLY DOES NOT ACT ON ITS OWN. IT ACTS THROUGH THE INDIVIDUALS.

A. THE CORPORATE SHAREHOLDERS.

Q. WHO? NAME THOSE PERSONS, SIR, THAT MADE THE DECISION TO HIRE A PUBLIC RELATIONS FIRM.

A. THERE WAS A MR. SIRACUSA, DR. SLOTOROFF, MESSRS. DEVINE, MYSELF, MY BROTHER, MR. KEPNER, AND MR. MAULER.

Q. WAS MR. TORCASIO THERE, AS WELL?

A. HE MAY OR MAY NOT HAVE BEEN THERE. I KNOW THERE WERE A COUPLE OF MEETINGS WHERE HE DIDN'T ATTEND. I DON'T KNOW IF HE ATTENDED THIS MEETING OR NOT.

Q. WHEN DID THIS MEETING TAKE PLACE?

A. THEY WERE ALL PRINCIPALS. I THINK THEY WERE ALL PRESENT, BUT MAYBE ONE (1) OR TWO (2) OF THEM WAS NOT.

Q. YOU WERE PRESENT?

A. I WAS PRESENT.

Q. WHEN DID THIS MEETING TAKE PLACE AT

WHICH IT WAS DECIDED TO HIRE A PUBLIC RELATIONS FIRM?

A. I REALLY DON'T KNOW.

Q. APPROXIMATELY. WHAT YEAR?

[27] A. WELL, IT WOULD BE 1986.

Q. ALL RIGHT, SIR. AND WHAT WAS THE PUBLIC RELATIONS FIRM TO DO?

A. WHEN WE PURCHASED THE GRANDE HOTEL – IT WAS FORMERLY THE HOLIDAY INN, AND THE HOLIDAY INN WAS TAKEN OVER BY THE BANK. IT WAS TAKEN OVER BY THE BANK AND OPERATED BY THE BANK – BY A HOLDING COMPANY FOR A PERIOD OF THREE (3) MONTHS OR SO.

AND THE HOLDING COMPANY RAN A VERY POOR HOTEL. WHEN YOU WENT THERE, THE LINEN WAS INFERIOR, THE FOOD WAS INFERIOR, EVERYTHING WAS INFERIOR.

AND THEY DIDN'T EXPEND FUNDS THAT WERE NECESSARY TO MAINTAIN THE PROPERTY. SO THAT I THINK IN THE THREE (3) MONTHS THAT THE BAD IMAGE THAT THEY CREATED HAD TO BE UNDONE.

Q. YOU SAY, "THREE (3) MONTHS." YOU ARE REFERRING TO THE THREE-MONTH PERIOD THAT IS REFERRED TO IN THAT CONTRACT BEFORE YOU?

A. I AM REFERRING TO THE THREE-MONTH PERIOD THAT THE HOLDING COMPANY OPERATED THE HOTEL UNTIL WE TOOK OVER.

MR. CAREY: ALL RIGHT, SIR.

(WHEREUPON, AUSA JOSEPH F. SAVAGE, JR., ENTERED THE GRAND JURY ROOM.)

BY MR. CAREY:

[28] Q. YOU SAID IT WAS DECIDED AT A MEET-

ING OF THE STOCKHOLDERS AT WHICH YOU WERE PRESENT TO HIRE A PUBLIC RELATIONS FIRM. WHO WENT OUT AND NEGOTIATED THE CONTRACT?

A. I'M NOT SURE. I PRESUME THAT OUR ATTORNEY DID THAT.

Q. MR. D'ANNIBALLE?

A. YES.

Q. AND YOU UNDERSTOOD –

A. I'M NOT CERTAIN.

Q. YOU SAID YOU UNDERSTOOD THAT THE FIRM THAT WAS HIRED WAS MR. TONKOVICH'S FIRM OR THE ONE THAT HE WAS ASSOCIATED WITH?

A. THE ONE THAT HE WAS EMPLOYED BY.

Q. WHO, IF ANYBODY, TOLD YOU THAT MR. – THE FIRM THAT MR. TONKOVICH WAS EMPLOYED BY WAS THE PUBLIC RELATIONS FIRM THAT WAS HIRED?

A. I JUST ASSUMED THAT.

Q. YOU SIMPLY JUST ASSUMED IT? NO ONE TOLD YOU THIS?

A. I ASSUMED THAT THAT WAS THE FIRM, SINCE THAT WAS THE ONLY PUBLIC RELATIONS FIRM THAT I KNEW OF.

Q. WAS THERE A SUBSEQUENT MEETING WHEN SOMEONE REPORTED BACK AND SAID, "WE HAVE NOW HIRED A PUBLIC RELATIONS [29] FIRM"?

A. NO. I THINK WE AUTHORIZED THE ATTORNEY TO GO AHEAD WITH THE PUBLIC RELATIONS FIRM BECAUSE WE THOUGHT IT WAS NECESSARY.

Q. I UNDERSTAND YOU AUTHORIZED HIM TO ENTER INTO THE CONTRACT, BUT I AM TRYING TO DETERMINE HOW IT IS YOU BECAME AWARE

THAT THE FIRM WAS HIRED AND HOW IT IS THAT YOU CAME TO BELIEVE IT WAS MR. TONKOVICH'S FIRM.

A. WELL, IT WOULD BE VERBALLY THROUGH THE ATTORNEY.

Q. SO, IS IT YOUR TESTIMONY THAT MR. D'ANNIBALLE TOLD YOU THAT THE FIRM HAD BEEN HIRED AND THAT IT WAS MR. TONKOVICH'S FIRM?

A. WELL, WE INSTRUCTED HIM, SO I JUST PRESUMED THAT, YOU KNOW, IT WAS CARRIED OUT.

Q. YOU INSTRUCTED HIM TO HIRE MR. TONKOVICH'S FIRM?

A. YES. THE CORPORATION AUTHORIZED HIM – WELL, WE AUTHORIZED HIM TO HIRE THE PUBLIC RELATIONS FIRM.

Q. THE PUBLIC RELATIONS FIRM?

A. YES. AND OBVIOUSLY IT WAS ROBERT CAIN, THEN.

Q. MY QUESTION IS, THOUGH – YOU SAID YOU UNDERSTOOD IT TO BE MR. TONKOVICH OR HIS FIRM.

A. YEAH. I THOUGHT IT WAS THE FIRM THAT HE WAS EMPLOYED BY.

[30] Q. AND THIS OCCURRED DURING THE MEETING IN WHICH YOU AUTHORIZED MR. D'ANNIBALLE TO ENTER INTO THIS CONTRACT?

A. I BELIEVE WHAT HAPPENED WAS THAT WE HAD A MEETING LOCALLY, AND THEN WE CALLED MR. D'ANNIBALLE FROM THE MEETING.

Q. AND TOLD HIM WHAT, SIR?

A. AND TOLD HIM TO GO AHEAD – TO RETAIN THE SERVICES OF THE PUBLIC RELATIONS FIRM.

Q. WHICH YOU UNDERSTOOD TO BE MR. TONKOVICH'S FIRM?

A. SINCE THAT WAS THE ONLY FIRM THAT I KNEW OF.

Q. RIGHT. THE ONLY CONVERSATION WHICH YOU HAD WITH ANYBODY ABOUT DOING PUBLIC RELATIONS WORK WAS WITH DAN TONKOVICH?

A. YES, YES.

Q. AND SUBSEQUENT TO THAT CONVERSATION, THERE WAS A MEETING OF THE STOCKHOLDERS IN WHICH YOU WERE PRESENT IN WHICH THE STOCKHOLDERS AGREED TO AUTHORIZE MR. D'ANNIBALLE TO ENTER INTO A PUBLIC RELATIONS CONTRACT WITH MR. TONKOVICH'S FIRM?

A. YES. WE THOUGHT IT WAS NECESSARY –

* * *

[37] Q. IT WAS YOUR UNDERSTANDING THAT YOU WERE HIRING A PROFESSIONAL PUBLIC RELATIONS FIRM, WHICH YOU UNDERSTOOD TO BE MR. TONKOVICH'S FIRM?

A. YES. I THOUGHT HE WAS ASSOCIATED WITH THE FIRM.

Q. LET ME SHOW YOU WHAT HAS BEEN MARKED AS GRAND JURY EXHIBIT NUMBER 6 (INDICATING).

A. (INDICATING.)

(BRIEF PAUSE.)

THE WITNESS: YES.

BY MR. CAREY:

Q. GRAND JURY EXHIBIT NUMBER 6 PURPORTS TO BE COPIES OF THREE (3) CHECKS, EACH IN THE AMOUNT OF FIVE THOUSAND DOLLARS ($5,000), TO MR. ROBERT CAIN ON THE ACCOUNT OF WVCC, INC. DID YOU AUTHORIZE THE PAYMNTS OF THOSE CHECKS?

A. WE AUTHORIZED THE AGREEMENT, AND WE GAVE OUR ATTORNEY THE RIGHT TO DRAW CHECKS AND ALSO OUR HOTEL MANAGER. I THOUGHT THAT THE CHECKS HAD TO BE SIGNED BY BOTH THE ATTORNEY AND OUR HOTEL MANAGER, BUT OBVIOUSLY IN THIS ACCOUNT JUST THE ATTORNEY'S SIGNATURE WAS SUFFICIENT.

Q. AND SO, IN THE SENSE THAT YOU AUTHORIZED HIM TO [38] ENTER THE CONTRACT, YOU AUTHORIZED THE PAYMENT OF THAT MONEY?

A. YES. I HAD NO PROBLEM WITH THAT.

Q. DO YOU RECALL HAVING ANY CONVERSATIONS WITH MR. D'ANNIBALLE BEFORE ANY OF THOSE CHECKS WERE ISSUED?

A. NO, I DON'T.

Q. YOU INDICATED THAT YOU BELIEVED THAT IT WAS MR. TONKOVICH'S FIRM THAT WAS BEING HIRED TO DO THE PUBLIC RELATIONS WORK. WHAT, IF ANYTHING –

A. WELL, I DIDN'T KNOW IT WAS HIS FIRM. I THOUGHT HE WAS EMPLOYED BY THE FIRM.

Q. ONE WHICH HE WAS ASSOCIATED WITH?

A. YES.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

Criminal Matter No. 86R0277

IN RE: GRAND JURY PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS AND TESTIMONY OF

F. FREDERICK PERONE

ADDUCED ON FEBRUARY 14, 1989, IN THE GRAND JURY ROOM, FEDERAL BUILDING, FEDERAL STREET, BLUEFIELD, WEST VIRGINIA.

APPEARANCES:

MICHAEL W. CAREY, ESQUIRE
UNITED STATES ATTORNEY

[3] PROCEEDINGS

(WITNESS SWORN; 10:48 A.M.)

THEREUPON CAME

F. FREDERICK PERONE,

CALLED AS A WITNESS, WHO, HAVING BEEN FIRST DULY SWORN ACCORDING TO LAW, TESTIFIED AS FOLLOWS:

THE FOREPERSON: STATE YOUR NAME, PLEASE.
THE WITNESS: F. FREDERICK PERONE

EXAMINATION

BY MR. CAREY:

Q. MR. PERONE, WHERE DO YOU LIVE, SIR?

A. MARGATE, NEW JERSEY.

Q. WOULD YOU SPELL THAT FOR US, SIR?

A. YES. M-A-R-G-A-T-E. THAT'S ONE (1) WORD.

Q. HAVE YOU LIVED THERE MOST OF YOUR LIFE?

A. I'VE LIVED IN ATLANTIC CITY ALL OF MY LIFE. THIS HAPPENS TO BE A SUBURB OF ATLANTIC CITY.

Q. WHAT IS YOUR OCCUPATION, SIR?

A. WELL, AS OF NOW, I'M AN ATTORNEY. JANUARY 1ST, I WAS AN ATTORNEY, ASSISTANT CITY SOLICITOR FOR THE CITY OF ATLANTIC CITY, ASSISTANT CITY SOLICITOR – OR CITY SOLICITOR FOR THE CITY OF EGG HARBOR TOWNSHIP, MUNICIPAL COURT JUDGE OF THE BOROUGH OF FOLSOM, AND A PRACTICING ATTORNEY.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

Criminal Matter No. 86R0277

IN RE: GRAND JURY 88-1 PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS HAD AND TESTIMONY OF

F. FREDERICK PERONE

ADDUCED ON MAY 30, 1989, IN THE GRAND JURY ROOM, UNITED STATES ATTORNEY'S OFFICE, THIRD FLOOR, 500 QUARRIER STREET, CHARLESTON, WEST VIRGINIA.

APPEARANCES:
NANCY C. HILL, ESQUIRE
ASSISTANT UNITED STATES ATTORNEY

[3] PROCEEDINGS

(WITNESS SWORN; 10:24 A.M.)

THEREUPON CAME
F. FREDERICK PERONE,
CALLED AS A WITNESS, WHO, HAVING BEEN FIRST DULY SWORN ACCORDING TO LAW, TESTIFIED AS FOLLOWS:

THE FOREPERSON: YOU MAY BE SEATED. AND I WILL SAVE THE ATTORNEY THE TIME AND TROUBLE OF CAUTIONING YOU. WE HAVE THIS BLOWER GOING. IF YOU DON'T SPEAK UP, THE

FOLKS IN THE ROOM WILL HAVE A HARD TIME HEARNG YOU.

THE WITNESS: I'LL TRY TO TALK TO THE LAST PERSON IN THE LAST ROW. GOOD MORNING.

EXAMINATION

BY MS. HILL:

Q. WOULD YOU STATE YOUR NAME, PLEASE?

A. YES. F. FREDERICK PERONE.

Q. YOUR OCCUPATION?

A. I'M AN ATTORNEY.

Q. WHERE DO YOUR PRACTICE?

A. NEW JERSEY.

* * *

[71] Q. YOU SPENT QUITE A LOT OF TIME REVIEWING THE BILLS THAT WERE PRESENTED TO THE WEST VIRGINIA LEGISLATURE AND PREPARING YOUR OWN BILL ON CASINO GAMBLING DURING THE 1986 SESSION, DIDN'T YOU?

A. I SPENT A LOT OF TIME GOING OVER THE NEW JERSEY BILL, TOO. ". . . FORTY PERCENT (40%) OF TAX REVENUE FOR PUBLIC SCHOOLS, THEREBY REDUCING REAL ESTATE TAXES THROUGHOUT THE STATE."

Q. I HAVE ASKED YOU SEVERAL QUESTIONS – SEVERAL TIMES IF YOU KNEW THAT ANY MONEY FROM WVCC WAS GOING TO DAN TONKOVICH.

I DON'T WANT THERE TO BE ANY MISTAKE ABOUT IT. I'M TALKING ABOUT WHETHER OR NOT IN 1986, YOU HAD ANY INFORMATION WHETHER ANY MONEY, ANY MONEY, FROM WVCC WAS GOING TO DAN TONKOVICH, THE PERSON, OR DAN TONKOVICH, THE PRESIDENT OF THE WEST VIRGINIA SENATE.

DID YOU HAVE ANY SUCH KNOWLEDGE?

A. I WOULD HAVE TO ANSWER THAT BY SAYING THAT NONE WAS AUTHORIZED TO GO TO MR. TONKOVICH BY ME.

Q. I'M ASKING YOU IF YOU KNEW ABOUT IT. I'M NOT [72] ASKING YOU WHETHER YOU AUTHORIZED IT.

A. AS FAR AS I KNOW, NONE WENT TO MR. TONKOVICH. THE ONLY MONIES THAT WERE DISPENSED IN ANY WAY, IN ANY WAY, THAT COULD REMOTELY BE ASSOCIATED WITH MR. TONKOVICH WAS OUR EFFORTS TO ENGAGE A PUBLIC RELATIONIST.

AND AS I SAID, IT WAS MY UNDERSTANDING THAT MR. TONKOVICH HAD AN INTEREST IN A FIRM WHERE HE WAS INVOLVED IN PUBLIC RELATIONS. WE WORKED THAT THROUGH OUR ATTORNEY.

Q. ARE YOU SAYING YOU AUTHORIZED THE PAYMENT OF MONEY TO DAN TONKOVICH'S PUBLIC RELATIONS FIRM AND YOU KNEW THAT THE MONEY WAS BEING PAID? IS THAT WHAT YOU ARE SAYING?

A. I THOUGHT THAT THERE WAS A PUBLIC RELATIONS FIRM THAT HE WAS EITHER AN EMPLOYEE OF OR HAD AN INTEREST IN.

Q. YOU'RE GOING TO HAVE TO ANSWER THIS QUESTION WAY OR THE OTHER, YES OR NO. ARE YOU SAYING THAT AT THE TIME THIS OCCURRED IN 1986, YOU AUTHORIZED OR KNEW THAT MONEY FROM WVCC WAS BEING PAID TO A PUBLIC RELATIONS FIRM THAT DAN TONKOVICH WAS EITHER AN EMPLOYEE OF OR HAD AN INTEREST IN? IS THAT WHAT YOU ARE SAYING?

A. THAT, I BELIEVE, WAS THE INFORMATION THAT WAS GIVEN TO US.

Q. BY WHO?

A. I DON'T KNOW BY WHO. AND THAT IS THE [73] INFORMATION THAT WE DISCUSSED, AND I'M SURE BY, THROUGH, AND WITH THE ADVICES OF OUR ATTORNEY, APPROACHED AND BROACHED THAT SITUATION TO MAKE SURE THAT THERE WOULD BE NO IMPROPRIETY.

Q. SO, WAS MONEY PAID TO SOME PUBLIC RELATIONS FIRM THAT DAN TONKOVICH HAD SOME KIND OF AN INTEREST IN?

A. IT WAS SUPPOSED TO HAVE BEEN PAID TO A PUBLIC RELATIONIST. NOW, WHO THAT WAS, THE CIRCUMSTANCES OF IT, THE AMOUNTS OF THE PAYMENTS, WHEN THEY WERE DUE, I CAN'T TELL YOU WHAT THAT WAS.

Q. YOU DID NOT TAKE AN INTEREST IN IT AT THAT TIME TO FIND OUT?

A. IT WAS ONE OTHER ITEM IN THE OPERATION OF THE HOTEL.

Q. FIFTEEN THOUSAND DOLLARS ($15,000) BEING PAID TO ROBERT CAIN AND YOU DID NOT KNOW ABOUT IT AT THE TIME IS WHAT YOU'RE SAYING?

A. NO, THAT'S NOT WHAT I'M SAYING. AND I WISH YOU WOULD NOT PUT WORDS IN MY MOUTH. WE HAVE SAID TIME AND TIME AND TIME AGAIN THAT THE FIFTEEN THOUSAND DOLLARS ($15,000) WAS TO BE PAID FOR PUBLIC RELATIONS WORK, AND WE HAD OUR ATTORNEY DRAW AN AGREEMENT TO THAT EFFECT.

IN HIS AGREEMENT, HE SPECIFICALLY INDICATED BECAUSE OF THE SENSITIVITY IN MY

MIND OF THE SITUATION THAT [74] THERE WOULD BE ABSOLUTELY NO EFFORT TO INFLUENCE ANY LEGISLATOR IN THE LEGISLATION.

Q. LET'S GO BACK, NOW. LET'S JUST GO BACK AND REHASH THIS ONE MORE TIME. I SHOWED YOU THIS TYPEWRITTEN DOCUMENT PREVIOUSLY, WHICH IS DATED FEBRUARY 3, 1986, WHICH PURPORTS TO BE A CONTRACT BETWEEN WVCC AND ROBERT CAIN (INDICATING)?

A. (INDICATING) UH-HUH.

Q. IS WHAT YOU ARE SAYING, THAT AT THE TIME THAT DOCUMENT WAS WRITTEN YOU UNDERSTOOD FROM A SOURCE THAT YOU CANNOT IDENTIFY THAT DAN TONKOVICH HAD AN INTEREST –

A. THAT I'M NOT AWARE OF. I CERTAINLY WOULD IDENTIFY THE SOURCE IF I KNEW IT.

Q. A SOURCE THAT YOU SAY AT THIS POINT IN TIME YOU CANNOT REMEMBER. YOU UNDERSTOOD THAT DAN TONKOVICH HAD AN INTEREST IN A PUBLIC RELATIONS FIRM?

A. THAT WAS MY PERSONAL UNDERSTANDING OF THE WAY IT WAS EXPLAINED.

Q. AND ARE YOU SAYING NOW THAT BACK AT THAT TIME IN 1986, THAT YOU AND THE OTHER INVESTORS AUTHORIZED FIFTEEN THOUSAND DOLLARS ($15,000), THAT SUM OF MONEY, TO BE PAID TO THIS PUBLIC RELATIONS FIRM?

A. YES.

[75] Q. AND ARE YOU SAYING THAT THIS CONTRACT WITH ROBERT CAIN IS THE CONTRACT THAT MEMORIALIZES THE PAYMENT OF THAT MONEY TO THAT PUBLIC RELATIONS FIRM?

A. THAT IS MY ASSUMPTION.

Q. AND AT THE TIME, YOU DID NOT KNOW WHO ROBERT CAIN WAS?

A. NO. I NEVER KNEW A ROBERT CAIN.

Q. BUT, NEVERTHELESS, YOU ARE SAYING THAT YOU AND THE OTHER INVESTORS AUTHORIZED FIFTEEN THOUSAND DOLLARS ($15,000) TO BE PAID TO A PUBLIC RELATIONS FIRM YOU BELIEVED AT THE TIME TO BE ASSOCIATED WITH DAN TONKOVICH?

A. OR HE ASSOCIATED WITH IT.

Q. AND YOU THOUGHT THAT WAS A SENSITIVE SITUATION?

A. I THOUGHT SO.

Q. AND ARE YOU SAYING THAT BECAUSE OF THAT THERE WAS SPECIAL LANGUAGE INCLUDED IN THIS CONTRACT THAT SAYS YOU WILL NOT ATTEMPT TO INFLUENCE ANY VOTE OR ANY POSITION OF ANY LEGISLATOR DURING THE COURSE OF THIS AGREEMENT?

A. I DON'T KNOW THAT IT WAS BECAUSE OF THAT, BUT IT IS A CIRCUMSTANCE THAT I THOUGHT WAS SENSITIVE. AND WE HAD AN ATTORNEY TO REPRESENT US. EVERYTHING WE DID, BY WAY OF CONTRACT OR OTHERWISE, WAS DONE THROUGH THE ATTORNEY.

* * *

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No. 92-726

In the Supreme Court of the United States

OCTOBER TERM, 1992

ANTHONY THOMAS TORCASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court committed plain error when it instructed the jury that the government was not required to prove that a public official committed or promised to commit a *quid pro quo* in order to convict petitioner under 18 U.S.C. 1951.

2. Whether the district court committed reversible error by refusing to admit into evidence the grand jury testimony of two unavailable witnesses.

3. Whether petitioner's grand jury testimony should have been suppressed because he was not advised of his rights on the record before he testified.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 959 F.2d 503.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1992. A petition for rehearing was denied on August 6, 1992. Pet. App. 10a. The petition for a writ of certiorari was filed on October 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of West Virginia,

petitioner was convicted of aiding and abetting extortion under color of official right, in violation of 18 U.S.C. 1951, and making a false statement to a federal grand jury, in violation of 18 U.S.C. 1623. The district court sentenced him to concurrent terms of 36 months' imprisonment on the extortion count and 24 months' imprisonment on the perjury count, to be followed by a three-year period of supervised release, and a $5,000 fine. The court of appeals affirmed. Pet. App. 1a-9a.[1]

1. a. During its winter session of 1986, the West Virginia legislature was scheduled to consider whether the State should legalize gambling. Petitioner, who had worked for years in New Jersey's legalized gambling business, had begun advising a group of investors who hoped to operate a gambling casino in Weirton, West Virginia. The investors included Fred Perone and his brother Ralph. In November 1985, West Virginia Senate President Daniel R. Tonkovich met with the investors to discuss the economic benefits of legalized gambling. The following month, at a similar meeting between Tonkovich and the investors, Fred Perone inquired whether Tonkovich, who owned a small public relations firm, would be interested in conducting a public relations campaign designed to increase public interest in legalized

[1] Relying on its decision in *United States* v. *Dunnigan*, 944 F.2d 178 (4th Cir. 1991), the court of appeals remanded the case for resentencing because the district court had increased petitioner's offense level under the Sentencing Guidelines by two levels on the basis of petitioner's denial of guilt during his trial testimony. The court of appeals subsequently granted the government's motion for a stay of its mandate pending this Court's decision in *United States* v. *Dunnigan*, No. 91-1300 (argued Dec. 2, 1992). See Pet. 3.

gambling. Tonkovich declined. After the meeting, petitioner attempted to give Tonkovich a campaign contribution of $1,000 in cash. Tonkovich refused to accept the contribution. Pet. App. 2a-3a, 6a; Gov't C.A. Br. 4-8.

A month later, after another meeting, petitioner asked Tonkovich to become the investors' "in-state consultant." C.A. App. 83-84. The two men agreed on a $15,000 contract, without specifying what Tonkovich was to do as a "consultant." *Id.* at 85. Tonkovich suggested that the contract be put in the name of Robert Cain, Tonkovich's administrative assistant. Pet. App. 3a; Gov't C.A. Br. 8-10.

Tonkovich subsequently drafted a handwritten contract that was given to Robert D'Anniballe, the investors' attorney, who revised some of its provisions and returned a copy to Tonkovich. The final version called for three $5,000 payments for public relations work to be done in February and March 1986. D'Anniballe made all three payments to Cain in February 1986. Cain transferred $11,400 to Tonkovich and retained $3,600 to pay taxes on the checks that had been made out to him. Pet. App. 3a-4a; Gov't C.A. Br. 10-11.

In February 1986, petitioner, who had met Tonkovich on only two previous occasions, gave Tonkovich $1,000 in cash for his newborn son. In May 1986, petitioner gave Tonkovich an additional $1,000 in cash as a Mother's Day gift for Tonkovich's wife. In June 1986, however, Tonkovich became apprehensive when a Charleston newspaper published articles that questioned his outside business activities and raised the issue of extortion. Tonkovich decided to return the $1,000 Mother's Day gift; but the check

that he sent was never cashed and was sent back to him. Through Cain, Tonkovich returned the $15,000. Pet. App. 4a; Gov't C.A. Br. 13-16.

b. In December 1988, Cain gave federal investigators information that it had been Tonkovich who had dealt with petitioner in connection with the $15,000 payment. Petitioner, who was regarded as a subject rather than a target of the investigation, was subpoenaed to testify before a federal grand jury in Bluefield, West Virginia, on January 5, 1989. Petitioner testified under oath that "I never personally gave Dan Tonkovich no money." C.A. App. 303A.

2. a. Fred and Ralph Perone testified before the grand jury. Fred Perone acknowledged that the investors had agreed to pay $15,000 to a public relations firm that had some connection with Tonkovich. Pet. App. 38a-39a. Ralph Perone could not recall whether petitioner had been at the meeting at which the investors decided to hire the firm. *Id.* at 26a.

Prior to trial, petitioner indicated that he wished to offer into evidence the statements made by the Perones before the grand jury. The government moved *in limine* to exclude the statements as hearsay. At a hearing on the government's motion *in limine*, the district court said that it would exclude the statements because "the hearing has indicated no basis for the admissibility of the grand jury testimony." C.A. App. 45. Although the court left open the possibility that the testimony could be admitted at trial, the defense did not raise the issue again. Pet. App. 6a-7a.

b. Petitioner moved *in limine* to suppress his own grand jury testimony, because he was not represented by counsel and was neither informed that he was a target of the grand jury investigation nor advised on the record of his constitutional rights. The district

court denied the motion on the ground that petitioner had received adequate notice of his Fifth Amendment rights, which were outlined in the materials that accompanied his grand jury subpoena. Pet. App. 7a.

c. At petitioner's trial, Tonkovich testified in detail about the payments he had received from petitioner in 1986. Tonkovich stated that he believed petitioner had attempted to obtain "access and influence" over him through the payments. C.A. App. 102. The district court instructed the jury, with respect to the extortion count, that "[i]t is not necessary that the government prove that any public official, including Senator Tonkovich, committed or promised to commit a quid pro quo, that is, an official action in return for the payment of the money." *Id.* at 252-253. But the court added that the government had to show that petitioner gave Tonkovich the money "with the expectation that Mr. Tonkovich would extend to him some benefit or refrain from some harmful action in his position as a state senator, and that Mr. Tonkovich accepted the thing of significant value knowing it was being transferred to him because of his office." *Id.* at 253. Petitioner did not object to that instruction.

3. a. The court of appeals affirmed. Pet. App. 1a-9a. It rejected (*id.* at 5a-6a) petitioner's contention that under *McCormick* v. *United States*, 111 S. Ct. 1807 (1991), the government was required to prove a specific *quid pro quo* in order to show a violation of the Hobbs Act. The court noted that *McCormick* was expressly limited to the context of campaign contributions, see *id.* at 1817 n.10, and explained that this Court's imposition of a specific *quid pro quo* requirement for campaign contributions in *McCormick* "balance[d] the interest in public integrity with the

practical demands of democra[c]y and avoid[ed] criminalizing legitimate behavior." Pet. App. 5a. The court also pointed out that this case did not involve campaign contributions, but simply "investors in a gambling enterprise who were trying to have gambling legalized in a state where it was illegal." *Id.* at 5a-6a.

The court also upheld the district court's evidentiary rulings. It held that the district court did not abuse its discretion by deciding to exclude the Perones' grand jury testimony and to admit petitioner's grand jury testimony.[2]

b. Petitioner filed a petition for rehearing with a suggestion of rehearing en banc. While the petition and suggestion were pending before the court of appeals, this Court decided *Evans* v. *United States*, 112 S. Ct. 1881 (1992). Petitioner brought the *Evans* decision to the attention of the court of appeals, suggesting that the district court's instruction that a specific *quid pro quo* need not be proved was plain error requiring reversal of petitioner's conviction. The court of appeals denied the petition for rehearing. Pet. App. 10a.

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[2] The court likewise rejected petitioner's contentions that the evidence was insufficient to show that petitioner had paid money with the expectation of receiving some benefit from Tonkovich (Pet. App. 4a-5a); that the district court had erred in excluding from evidence a statement Fred Perone had made to an investigator from the New Jersey Division of Gaming Enforcement (*id.* at 6a); that the district court had erred in not instructing the jury that it was required to find that Tonkovich had overtly solicited payments from petitioner (*id.* at 7a-8a); and that the district court had erred by not instructing the jury that it was required to agree unanimously on at least one of the payments made by petitioner to Tonkovich (*id.* at 8a-9a). Petitioner has not pursued those contentions in this Court.

ARGUMENT

1. Petitioner first contends (Pet. 17-19) that the district court committed plain error when it instructed the jury that the government was not required to prove that Tonkovich "committed or promised to commit a quid pro quo." C.A. App. 252-253.

In *McCormick* v. *United States*, *supra*, which involved the receipt of campaign contributions, this Court held that "[t]he receipt of such contributions is * * * vulnerable under the [Hobbs] Act as having been taken under color of official right, but only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." 111 S. Ct. at 1816. In *Evans* v. *United States*, *supra*, which involved the receipt of a $7,000 payment that was not dressed up as a campaign contribution, the Court held "that the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." 112 S. Ct. at 1889.[3]

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[3] The difference is in the specificity of the agreement. That is, it would not be a violation of the Hobbs Act to make a campaign contribution to a legislator because the legislator was generally in favor of protectionist trade policy and the contributor's business would profit from protectionist legislation. But it would be a violation of the Hobbs Act, under *McCormick*, for a candidate to accept a campaign contribution that was expressly conditioned on the candidate's agreement to vote in a particular manner on a specific matter. It would also be a violation of the Hobbs Act, under *Evans*, for a legislator to accept a cash payoff (not a campaign contribution) from a person the legislator knows to have an interest in protectionist trade legislation, where the legislator knows that the payment was made in return for the legislator's official

In this case, petitioner did not contend that he gave Tonkovich campaign contributions—he "denied that he had paid or offered to pay any money to Tonkovich." Pet. 8. It is clear that the jury did not believe petitioner, but instead accepted Tonkovich's testimony that petitioner gave him money and did so in order to obtain "access and influence" with respect to the gambling legislation. C.A. App. 102. The jury instructions that were given in this case were consistent with *Evans*. While the jury was instructed that it did not need to find that Tonkovich agreed to perform a specific act in exchange for the money he received, it was told that, in order to convict, it had to find that petitioner gave Tonkovich money "with the expectation that Mr. Tonkovich would extend to him some benefit or refrain from some harmful action in his position as a state senator, and that Mr. Tonkovich accepted the thing of significant value knowing it was being transferred to him because of his office." *Id.* at 253. That was sufficient to satisfy *Evans*, for it established that petitioner believed the payment was made "in return for official acts," 112 S. Ct. at 1889; *i.e.*, the instruction advised the jury that it had to find that petitioner made the payment to ensure that Tonkovich would not give petitioner "less favorable treatment" with respect to his official duties in connection with the gambling legislation. *Evans*, 112 S. Ct. at 1892-1893 (Kennedy, J., concurring).

Moreover, even if the instructions in this case did not set forth with ideal precision the nature of the agreement required to trigger Hobbs Act liability,

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acts of support for protectionist trade policies, even if no specific act was promised in exchange for the payment.

that issue is not properly presented here, because petitioner did not object to the court's instructions on that ground, and the instructions cannot be said to constitute plain error. It is clear that no "miscarriage of justice" occurred on account of any imprecision in the jury instructions. *United States* v. *Young*, 470 U.S. 1, 16 (1985). Petitioner did not defend on the theory that he had made legitimate payments to Tonkovich. To the contrary, he denied making any payments at all. It was clear that, if payments were made, they were made so that Tonkovich, the President of the West Virginia Senate, would at least not oppose petitioner's efforts to have gambling legalized in West Virginia. Thus, the precise nature of the agreement between petitioner and Tonkovich was not an issue in this case—the issue in dispute at trial was whether petitioner gave Tonkovich money, and the jury concluded that he did. For that reason, any error in the court's instructions did not rise to the level of plain error. This case is therefore not an appropriate vehicle for further refining the specificity of the requirement of an agreement to perform official acts in a case not involving a campaign contribution.

2. Petitioner next contends (Pet. 20-23) that the district court committed reversible error by excluding the Perones' grand jury testimony. Petitioner characterizes that testimony as showing that it was the Perones, and not petitioner, who bribed Tonkovich. Petitioner contends that the testimony should have been admitted under Fed. R. Evid. 804(b)(1), which authorizes the admission of former testimony, such as grand jury testimony, if the prosecutor "had an opportunity and similar motive to develop the testimony." *Ibid.* Petitioner argues that the district

court's failure to admit the testimony under Rule 804(b)(1) is contrary to this Court's decision in *United States* v. *Salerno*, 112 S. Ct. 2503 (1992).

This contention is without merit. The principal difficulty with petitioner's contention is that the argument made in the petition for a writ of certiorari bears no relation to the argument made to the district court by petitioner's trial lawyers (who were different than petitioner's appellate counsel). First, petitioner did not argue to the district court that the Perones' testimony before the grand jury exculpated petitioner. Indeed, at the hearing petitioner did not explain why he wanted to admit the testimony, but merely said that "we should have the opportunity to use [it] for whatever purposes that are relevant to the case and material to the case," such as "to establish other facts in the case." C.A. App. 44-45. And in the district court, petitioner did not argue that the Perones' grand jury testimony was admissible under Rule 804(b)(1). Rather, petitioner relied on the "catchall" exception, Fed. R. Evid. 804(b)(5), which provides for the admission of hearsay having "circumstantial guarantees of trustworthiness" under certain conditions. But when the district court asked petitioner's counsel what "indicia of reliability" there were to support the admission of the Perones' grand jury testimony, counsel responded that "it's a difficult question for us to answer," and added that "since the government has at least relied in some extent upon the grand jury testimony for the purposes of indicting this defendant, that that gives it the aura of responsibility and trustworthiness." C.A. App. 41.

The government did not understand the Perones' grand jury testimony to exculpate petitioner. At the

hearing, the United States Attorney characterized the testimony as being that "I didn't know anything personally about the hiring of Mr. Tonkovich." C.A. App. 43. The government thought that petitioner wanted to introduce the grand jury testimony in order to impeach it with subsequent hearsay testimony in which Fred Perone stated clearly that he had hired Tonkovich. *Id.* at 43-44. And it was the government—not petitioner—that suggested that there was an argument that the grand jury testimony was admissible under Rule 804(b)(1), C.A. App. 43, although the U.S. Attorney went on to argue that the requirements of that Rule—particularly the requirement that the government have a motive to develop the testimony—were not satisfied. *Id.* at 44. In any event, petitioner did not endorse the argument that the testimony was admissible under Rule 804(b)(1), but persisted in arguing that the testimony was admissible under Rule 804(b)(5). C.A. App. 44-45. The district court concluded the hearing by correctly stating "that the hearing has indicated no basis for the admissibility of the grand jury testimony." *Id.* at 45. The court added that it was "not entirely precluding it at this time" (*ibid.*), but petitioner made no subsequent effort to reopen the matter.

Because petitioner did not argue the admissibility of the Perones' grand jury testimony under Rule 804(b)(1), he failed to satisfy one of the principal requirements for admission of evidence under that rule—showing that the government had "an opportunity and similar motive to develop the testimony" during the grand jury proceeding. See *Salerno*, 112 S. Ct. at 2507. That requirement is not automatically satisfied whenever the defendant seeks to admit

testimony by persons who were called by the government as witnesses before the grand jury. See *id.* at 2508-2509.[4]

Moreover, testimony that the Perones were involved in "hiring" Tonkovich was not helpful to petitioner. There was no dispute that the investors' lawyer, D'Anniballe, acting on behalf of the investors with the approval of Fred Perone, had made the three $5,000 payments to Cain. See C.A. App. 167-168 (D'Anniballe testified that he received a handwritten contract from Fred Perone, and prepared a typewritten contract and a check payable to Cain only after checking with Fred Perone); *id.* at 195-196 (hotel employee Steve Pahides testified that Fred Perone annotated a handwritten contract that Pahides, at Perone's direction, later delivered to D'Anniballe); *id.* at 205 (investor Jack Slotoroff testified that Fred Perone held himself out as ultimately responsible for hiring and paying Tonkovich's firm). But, contrary to petitioner's assertions that the investors were separate from him, see Pet. 22, D'Anniballe's testimony showed that petitioner had a 13 or 13½% interest in the corporation, while the Perones' had a larger interest. C.A. App. 162-163. In short, the evidence that the Perones participated in the payments to Tonkovich was not exculpatory

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[4] Petitioner notes that on remand from this Court, a panel of the Second Circuit held that the government in the *Salerno* case had a sufficient opportunity and motive to develop the testimony at issue there. 974 F.2d 231 (1992). The full court of appeals has recently granted en banc review in that case, however, so the panel decision has been vacated and is not entitled to any precedential weight. No. 88-1464 (en banc review granted Nov. 25, 1992).

as to petitioner, because the evidence showed that the Perones and petitioner all played a role in making payments to Tonkovich. It is therefore highly unlikely that admission of the statements made by the Perones before the grand jury would have affected the outcome of this case.

3. Finally, petitioner contends (Pet. 23-26) that the court of appeals erred when it affirmed the district court's refusal to suppress petitioner's grand jury testimony, which provided the basis for his perjury conviction. This contention likewise lacks merit.

Petitioner does not dispute that he received an "Advice to Grand Jury Witnesses" form with his grand jury subpoena. That form advised petitioner, among other things, that anything he said before the grand jury might be used against him in the grand jury or in court, that he had a right to consult an attorney before testifying, that he could have his attorney outside the grand jury room, and that he would be afforded a reasonable opportunity to step outside to consult with counsel. C.A. App. 70. Petitioner argues (Pet. 25), however, that he was a "target" of the investigation, and should have been further apprised during his appearance of his right not to incriminate himself. He asserts (*ibid.*) that the grand jury proceeding violated Department of Justice policy as contained in Section 9-11.150 of the United States Attorneys' Manual (Oct. 1988), which states that federal prosecutors "should" give "subjects" and "targets" of investigations warnings in front of the grand jury, since he was not advised of his rights on the record before the grand jury. He also contends

(Pet. 25) that the prosecutors' conduct undermined the fundamental fairness of the proceeding.[5]

Petitioner's reliance on the United States Attorneys' Manual is misplaced. The Manual is quite clear that the guidelines it sets forth are not intended to provide a defendant with any substantive or procedural rights. See Manual, Section 1-1.100 (Oct. 1988). Moreover, the Manual is not statutorily mandated and confers no rights upon criminal defendants. See *United States* v. *Caceres*, 440 U.S. 741 (1979) (IRS regulations governing the conduct of electronic surveillance not enforceable by a defendant seeking exclusion of evidence against him). Thus, even where the internal Department of Justice policies set forth in Section 9-11.150 of the Manual are not followed, suppression of a defendant's grand jury testimony is not warranted. See *United States* v. *Pacheco-Ortiz*, 889 F.2d 301, 303, 311 (1st Cir. 1989) (grand jury "target" was given neither a written nor an on-the-record warning against self-incrimination).

Furthermore, it is settled law that the Constitution does not bar a prosecution for perjury before the grand jury simply because the defendant had not been advised of his Fifth Amendment privilege against self-incrimination. *United States* v. *Mandujano*, 425

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[5] Petitioner asserted for the first time on appeal that the prosecutors who conducted the grand jury proceeding were guilty of misconduct. Assuming *arguendo* that the issue is properly before this Court, petitioner's contention (see Pet. 25-26) lacks merit. Although the prosecutors' disbelief of petitioner's testimony was apparent, petitioner was not abused or otherwise treated unfairly. In fact, the prosecutor who questioned petitioner specifically advised him of the possibility of perjury charges and gave him an opportunity to recant his false statements. See C.A. App. 331-332.

U.S. 564, 582 (1976) (plurality opinion); *id.* at 584-585 (Brennan, J., concurring in the judgment); *id.* at 609 (Stewart, J., concurring in the judgment); see *United States* v. *Washington*, 431 U.S. 181 (1977); *United States* v. *Wong*, 431 U.S. 174, 178-179 (1977); see also *Bryson* v. *United States*, 396 U.S. 64, 72 (1969) ("it cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked"). As this Court has held, "grand jury witnesses, including those * * * targeted for indictment, may be convicted of perjury on the basis of their false grand jury testimony even though they were not first advised of their Fifth Amendment privilege against compelled self-incrimination." *United States* v. *Washington*, 431 U.S. at 182 n.1 (citing *Mandujano* and *Wong*).

In this case, the courts below correctly found (see Pet. App. 7a) that the "Advice to Grand Jury Witnesses" form that petitioner received adequately apprised him of his Fifth Amendment rights. Thus, even though, as the court of appeals remarked (*ibid.*), the better practice would have been to advise petitioner of those rights on the record before the grand jury, that court was correct in its determination that the district court did not abuse its discretion when it declined to suppress petitioner's false testimony before the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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